United States Supreme Court.

OCTOBER TERM, 1888—NO. 159.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,

vs.

JAMIE S. GUARDIOLA AND TOMAS TEFEDOR,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN L. CADWALADER,
Counsel for Plaintiff in Error,
No. 36 Wall Street, New York.

STRONG & CADWALADER,
Attorneys.

EVENING POST JOB PRINT, New York.

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Statement.

This is a writ of error to the Circuit Court for the Southern District of New York, to review a judgment entered upon the verdict of a jury in favor of the defendants in error (plaintiffs below) against the plaintiff in error (defendant below), for $18,863.36, on October 5, 1885.

The case was twice tried, the jury having disagreed upon the first trial.

The action was brought by plaintiffs, residents of Cuba, copartners under the firm name of Guardiola & Tejedor, against an insurance company incorporated in Pennsylvania, to recover upon a policy of insurance issued by them, the invoice value of and freight upon 531½ hhds. of sugar, alleged to have been shipped by plaintiffs from Sagua la Grande, Cuba, in June, 1880, to the United

States, by the American brig *Georgia*, which was wrecked near Cardenas, Cuba, twenty-four hours after sailing from Sagua, less the proceeds of the sale of 223 hhds. saved and sold in New York as damaged.

The defenses set up by the defendants' answer were (1) that 368 hhds. of sugar, and no more, were shipped, the loss upon which had been paid in full before suit; (2) that the vessel was not seaworthy at the inception of the risk.

Upon the trial the main question was as to the amount of cargo actually on board.

The vessel sailed from Sagua June 14, 1880. She skirted the shore, leaking badly from the commencement of the voyage, and on the 15th or 16th was run ashore on a reef 30 miles out of her course, some 20 miles from Cardenas. The captain refused assistance from a passing lighter; other lighters, as if by arrangement, approached, four hogsheads were thrown over and a number taken from her in more or less damaged condition, leaving 163 unaccounted for. The master forthwith, after partly making his protest, absconded (see fol. 96 Protest). Intelligence was sent by telegraph of the loss, and Tejedor, one of the defendants, forthwith wrote a note after the receipt of this intelligence to his clerk Culmell (see fols. 171, 176) signed by himself, directing the despatching of a telegram to increase the insurance, which note was read in evidence without contradiction or explanation on the part of the plaintiff.

It being patent on all the facts that a fraud had been committed, and the crew having united in a statement that the cargo was short—the Insurance Company refused further payment, and the agents of plaintiff through whom the insurance was effected, declined to press the claim.

On the trial the plaintiffs proved that on May 26, 1878, the plaintiff in error issued to Geo. C. Carson & Co., of Philadelphia, an open policy in the sum of $100,000, insuring in said sum for account of whom it might concern, all goods for account of or consigned to them from port or ports in

the West Indies, to port or ports in the United States, north of Hatteras, upon a vessel or vessels agreed upon at the time of endorsement, such insurance being against perils of the sea * * * barratry of the master and mariners, and such other perils, losses, and misfortunes that should come to the hurt, detriment or damage of said freight or property, or any part thereof, all risks to be reported to the insurance company, and the amount declared as soon as ascertained.

That on June 22, 1880, at the request of Geo. C. Carson & Co., and on hearing from plaintiffs of the proposed shipment, there was endorsed by the defendant upon said policy for the benefit of the plaintiffs, the risks in controversy, *i. e.*, (1) upon the brig *Georgia*, from Sagua la Grande to Delaware Breakwater, for orders, thence to New York or Philadelphia, upon sugar, valued as $41,888, consigned to George C. Carson & Co., and (2) upon the freight, viz., $995 (Printed Record, p. 20).

The plaintiffs also read in evidence the invoice (p. 21), the bill of lading (p. 28) and five receipts for sugar delivered on board the *Georgia*, between June 3d and 14th, 1880, for amounts aggregating 315 hhds. and 1 tierce, signed by S. Dodds, the master of the vessel.

No oral testimony was offered by plaintiffs, but depositions of a number of witnesses, taken at Sagua, in Cuba, at the place where the transactions occurred and where the books, records, &c., &c. were, under a commission, were read, to prove the receipt of the cargo claimed to have been on board, to which testimony general reference is made as necessary to a clear comprehension of the foundation of this appeal.

Felipe Obeso, a clerk in the employ of the plaintiffs, deposed (p. 21) that he was manager in charge of the store of said firm at Sagua; that on June 11, 1880, he saw 48 hogsheads of sugar weighed and delivered on board the steam launch *Trillo*, and instructed the captain, Domingo Suarez, to take them to the *Boca*, twenty-one miles distant by river, and deliver them to the steam launch

Esperanza, for transfer to the *Georgia*. That it was his duty to receive and see weighed all sugars coming into and going out of plaintiff's stores; he did not personally weigh any sugars, but he saw them weighed and delivered on board the *Trillo;* and counted them, and kept the numbers, marks and figures. In a further additional deposition witness testified that the weight of the sugar testified in his former deposition, appeared in a memorandum which he produced and annexed to his deposition; he could not give the original, *because it was engrossed in his book of weights, &c., at the plaintiff's store in Sagua.*

The plaintiffs thereupon offered to read the memorandum in evidence to which the dependent objected that it was not competent, and was not the best evidence. The Court overruled the objection, to which the deponent duly excepted (p. 22). The memorandum was read in evidence, and is annexed to the bill of exceptions marked "A" (p. 97.)

On cross-examination the witness testified that the original of the said memorandum was in his own handwriting, engrossed in a book, at the time of his examination in the plaintiff's sugar store in Sagua, and that the details had been copied from the same book (p. 22.)

The defendant thereupon moved to strike out the evidence in said memorandum, it appearing affirmatively that the original book was in the possession of the plaintiffs. The Court denied the motion, and the defendant duly excepted (p. 23.)

Domingo Suarez, the captain of the *Trillo*, an employé of the plaintiff, deposed that on June 11th he received 48 hogsheads of sugar from plaintiff's wharf at Sagua, which he delivered on June 12th on board the *Esperanza*, then lying in the bay at the mouth of the river (p. 31).

Gabriel Garcia, a sugar weigher, in the employ of the plaintiffs, deposed that on May 19, 1880, he weighed 368 hogsheads of sugar then lying in the warehouse of Moré, Ajuria & Co., at the port or *Boca* of Sagua, which, on May 25th or 26th, by direction of the plaintiffs, he classified and marked for shipment, 324 hogs-

heads as "regular refined," marked S, and numbered 1 to 324; and 44 hogsheads as "common refining," marked $\frac{S}{C}$, numbered 116 to 159; and that he saw 216 of these hhds. put on board the *Georgia* at the wharf. That on June 3d he saw delivered and put on the plaintiff's steam launch *Esperanza*, 50 hhds. marked "S;" on June 4, he received 28 hhds. by railroad, which, with the 58 hhds. marked "S," in all 76 hhds. he saw delivered on the *Esperanza;* and on June 8, he weighed 34 hhds. marked $\frac{S}{C}$, numbered 82 to 115. That he saw the *Esperanza* leave the wharf and sail in the direction of the *Georgia* with the first 50 hhds. on June 3, and on the following day he saw the same launch leave the wharf with with 86 hhds. and go in the direction of the *Georgia*, then lying at anchor in the bay; "that he "saw the steam launch go on both days alongside the "*Georgia*, after having left the wharf with the cargo as "aforesaid, and on both occasions saw the launch come "from alongside the *Georgia* while she was lying at "anchor, and on both occasions when she returned to the "wharf she arrived empty, and that he was certain that "the steam launch did not go alongside any other vessel "or wharf after leaving the *Georgia*" (p. 23).

On cross-examination he stated that he personally weighed the said 368 hhds. and the 34 hhds.; that he could recall the weight of each package, as he had preserved them in his note-book; that he knew the number of hhds. weighed, and the weight of each, because he himself actually weighed 402, and delivered 396 as testified on his direct-examination; that he kept the original figures of those he weighed in his note-book of weights, which at the time of testifying was in his possession, from which he refreshed his memory as to dates and numbers (p. 24).

That at the time the launch was leaving he was weighing sugars in the store and seeing the cars loaded with sugar to take to the wharf; he being thirty or fifty yards distant from the launch; that he counted the hogsheads after they were in the launch. That he saw the launch deliver the sugar on board the *Georgia;* that he knew the

exact number of hogsheads—136—as he counted them in the launch (p. 24).

The plaintiffs having requested the witness to produce and annex to his deposition the memorandum referred to by him, he stated that he could not present the original, as he preserved in it all his transactions for the year, but that he produced a copy of the memorandum *made by himself* in his book of weights, the original of which was in his handwriting, in his possession. That besides the 216 hhds. which were put on the *Georgia* at the wharf, he was present and saw and delivered on the steam launch 214 hhds. more, all destined for the *Georgia*, and that he counted each and every hogshead as it passed from the wharf to the launch, but did not at the time of testifying recollect the number in each case; that he was present all the time that the steam launch remained at the wharf receiving sugar for the *Georgia*, and that he weighed and took a note of 402 hhds. of sugar and saw and counted 430 hhds. embarked on board and for the *Georgia* (p. 25).

The plaintiffs thereupon offered to read the said memorandum, to which the defendant objected that it was not competent evidence and was not the best evidence. The Court overruled the objection, and the defendant duly excepted (p. 25). The memorandum was then read in evidence. It is annexed to the bill of exceptions, marked Exhibit B (pp. 25–98).

Antonio Jorge, the captain of the *Esperanza*, which was owned by the plaintiffs (pp. 23–30), by whom witness was employed (p. 25–30), deposed that he carried on said launch from the wharf of Moré, Ajuria & Co. and delivered on board the brig *Georgia*, then lying in the bay—

On June	3d,	50	hhds.	of sugar,
" "	4th,	86	"	"
" "	5th,	53	"	1 tierce of sugar,
" "	9th,	78	"	of sugar,
" "	14th,	48	"	" received from the launch *Trillo* on June 12.

In all 315 hhds. 1 tierce (p. 29). That these dates and figures were partly from memory and partly from being refreshed from seeing papers in the hands of Guardiola & Tejedor. That he did not keep any tally or count of the sugars, but each time that he took any hogsheads from the shore or elsewhere for the brig he counted the number of hogsheads and found them to correspond with the receipts which he received from Garcia Bros., and afterwards returned to them with the signature of the mate and Custom-House officers, and that the the total number of the hogsheads which he delivered on board the *Georgia* was 315 hhds. and 1 tierce (p. 30).

On cross-examination witness admitted "that he knew the number of hogsheads that he received and delivered, as he had testified, *because he had refreshed his memory by seeing some receipts which he had received from the Garcia Bros. with each launch load, and which he afterwards returned to them after they had been signed by the mate and officer of customs.*"

He did not remember the hogsheads or receipts. The only account which he had kept *or had* was the mate's receipts, the originals of which were at the time of testifying in the possession of the plaintiffs. He testified from recollection, *refreshed by seeing the original receipts*, that his launch returned direct from the *Georgia* on the 3d, 4th and 5th of June, 1880, to the wharf of Moré, Ajuria & Co. The launch would carry 100 hogsheads when loaded.

Marcellino Garcia, plaintiff's shipping agent and attorney at the port, deposed that he ordered the captain of the *Georgia* to take his vessel to the wharf of Moré, Ajuria & Co. to load with a cargo of sugar, and that on May 26, 1880, she commenced loading, and continued at the wharf loading until June 1st, during which time she received on board 216 hogsheads, and not being able to take more cargo at the wharf, owing to the little draught of water, she went to anchor in the bay.

That on June 3d he ordered the captain of the *Esperanza* to go to the wharf, and receive 50 hogsheads and carry

them to the *Georgia ;* that on June 4th, by his orders, the steam launch received 86 hogsheads from the same wharf, and carried them to the brig; on June 5th he ordered the same launch to go to the wharf and receive 53 hogsheads and 1 tierce and carry them to the brig; on June 9th he gave the same orders as to 78 hogsheads. That two or three days previous to the clearing of the *Georgia*, the plaintiffs *sent to him* 48 hogsheads by the *Trillo*, but as he had no orders to clear the *Georgia* then, and knew the captain would claim to be cleared as soon as he received these on board *he* (the witness) *ordered the* 48 *hogsheads to be transferred to the launch Esperanza, which was done.* That the reason for changing the sugar from the *Trillo* to the *Esperanza* was because the *Trillo* was used exclusively for river traffic, the launches belonging to the same owner, Guardiola & Tejedor, and he wished to save the expense of keeping the two launches lying at the bay (p. 32). (*Compare the very different version of this affair given by Obeso and Saurez supra.*) That after the sugar had been on board the *Esperanza two or three days* he ordered it to be taken and delivered on board the *Georgia* (compare Jorge, p. 29). That this took place June 14th, and on the same day he cleared the vessel, and wrote plaintiffs that she had finished loading, having on board 531 hogsheads and 1 tierce. That on May 26th, when he opened up the register for the loading of the brig, he paid the export duty on 200 hogsheads, to be shipped; on May 29th he paid the export duty on 100 more hogsheads; on June 14th he paid the export duty on 100 hogsheads more; on June 9th on 100 hogsheads more, and on June 14th on 31 hogsheads and 1 tierce (p. 33).

On cross-examination the witness testified that he did not remember either the weight or number of the hogsheads which he saw weighed and shipped; he did not recollect if the *Esperanza* had any other sugars on board mixed with the cargo intended for the *Georgia*, nor whether she visited any other vessel after leaving the *Georgia*, without returning to the shore or wharf; that it would not be strange if she had, because she could carry

more than 100 hogsheads at a time, and it was customary to send a cargo for different vessels at the same time, to save her from returning to the wharf (p. 33).

José P. Ferreria, an officer of customs at Sagua, deposed that he counted the sugar shipped on the *Georgia*. That on June 3d he saw delivered from the wharf on board the *Esperanza* 50 hogsheads of sugar destined for the *Georgia;* on June 5th 53 hogsheads and 1 tierce; and on June 9th 78 hogsheads. That on June 14th he saw 48 hogsheads delivered from the *Trillo* to the *Esperanza* for the *Georgia;* he counted each of the hogsheads, both when on the launch and when on the wharf. That there was an export duty on sugars exported from Sagua to the United States—how much he didn't know. He knew it was paid by plaintiffs, because he had seen the policy, which could not have been issued unless the duty was paid. He did not know how much was paid (p. 34).

On cross-examination the witness stated that he had kept a memorandum of the number of hogsheads delivered from the wharf to the launch, and dates, the original of which at the time of testifying was in the Custom House, and a copy of the same in his possession; *that he did not speak from memory, but from a memorandum, which at the time of testifying he held in his hand, the original being in the Custom House;* that he could not from memory recall the weights, *neither could he tell the number of hogsheads from memory that were shipped on the Georgia; that he testified from a note in his hand, as he could not have kept the particulars in his memory.*

The defendant thereupon moved the Court that so much of the testimony of the said witness as related to the number of hogsheads shipped, either on board the Esperanza or the Trillo for the Georgia, be stricken out, upon the ground that the witness said on cross-examination, "I cannot tell from memory; I testify from the memorandum I hold in my hand," and that he did not annex the memorandum, and even the memorandum was a copy of one which he said was in the Custom House. The Court denied the motion, and the *defendant excepted* (p. 35).

Gerome Banasco, a clerk in the store of Moré, Ajuria & Co., at the Boca, when first called (p. 36), stated that he could not answer as to the number of hogsheads shipped and the dates of shipment by the *Georgia* until he had refreshed his memory by his books. His examination was adjourned until a subsequent day, when he was called, and testified that on May 20, 1880, 491 hogsheads were weighed and delivered to plaintiffs in the store of Moré, Ajuria & Co.; that the brig came alongside the wharf on May 15th and left on May 29th, having taken in 216 hogsheads. She then went to anchor in the bay, and that a part of the sugar referred to was put on board the *Esperanza* to be carried to her. He could not state how much, nor the days.

That he saw the launch leave the wharf and go towards the *Georgia;* she appeared to be loaded to her capacity, and she always returned light; that the *Georgia* was then lying at anchor in the bay *about three miles from the wharf.* On cross-examination, he stated that he personally saw weighed and delivered to plaintiffs from the store of Moré, Ajuria & Co. 491 hogsheads on or about May 20th; that of this number 216 were put on board the brig at the wharf between May 25th and 29th; that in addition *he believed* that 368 hogsheads of the same lot were put on board the *Georgia,* or sent to her by steam launch. *That he knew the number he had stated were actually weighed, from receipts which he had in the office* of Moré, Ajuria & Co. and Guardiola & Tejedor, by the latter having paid the wharfage of the same. That he himself made out the receipts for weighing and wharfage and sent them to the office of Moré, Ajuria & Co. in town for collection. *That of his own personal knowledge he could not tell how many hhds. were sent from the wharf by the Esperanza to the brig,* but he was certain the launch went several times from the wharf loaded to her full capacity; that he did not actually see the hhds. taken out of the launch and put aboard the brig *because of the distance* (Comp. M. Garcia, *supra*), and having no particular interest in the matter, and did not know whether the launch went

directly from the *Georgia* to the wharf or to any other vessel or vessels. He had seen one or more launches loaded at the wharf of Moré, Ajuria & Co. with cargoes of sugar for the *Georgia*, but did not recollect the names of the launches nor the number of hhds. received.

Being asked by the plaintiffs to produce the memorandum of weights of the 368 hhds. which he saw weighed, destined for the *Georgia*, as testified, he said he could not produce the same because it was kept in a book with all the other transactions of the store of Moré, Ajuria & Co. at the Boca, but he produced *a copy* of said memorandum which he stated was a true and correct copy of the original which he annexed to his deposition.

That the original *was in the handwriting of his deputy clerk Juan Vega* and was engrossed in a book kept for that purpose at the stores. That the details were received from Vega and Gabriel Garcia, the weigher of weigher of Guardiola & Tejedor; and the memorandum was made up from these details, witness being present at the weighing, and having examined the notes of his deputy and of Garcia, and found them to correspond; that he saw 216 hhds. delivered and shipped by the brig *Georgia* at the wharf; that he did not keep a memorandum in his own handwriting of these 216 hhds., but that the specific information in regard to them *was taken from the notes of Vega and Garcia and the Custom House officer;* that all that he knew concerning the remainder of the hhds. was that he saw them put on board the plaintiff's launch, together with other sugars which came by rail, making, all together, 267 hhds. and 1 tierce which were taken in several trips by the launch to the *Georgia;* that witness himself did not count them, but that his deputy counted them and took a note of the same and charged Guardiola & Tejedor with wharfage accordingly.

The plaintiffs thereupon offered to read in evidence the said memorandum, to which the defendant objected that it was not competent, and was not the best evidence.

The Court overruled the objection, to which defendant duly excepted.

The plaintiffs then read the statement, copy of which is annexed to the bill of exceptions marked E (p. 38).

Defendant thereupon moved to strike out from this deposition the memorandum attached, on the ground that it was not the memorandum of the witness, and not the original, and not made by him.

The Court denied the motion and the defendant duly excepted.

The defendant thereupon moved the Court to strike out all the evidence of the said witness concerning the weight of the sugar, upon the ground that the witness had no personal knowledge on that subject.

The Court denied the motion, and the defendant duly excepted (p. 38).

Ramon Valdes, a customs officer at the Boca, deposed (p. 42):

That on May 25th he received a policy from the Collector of the Port for 200 hogsheads to be loaded on the *Georgia*. On May 28th he returned the policy with his signature that they had been so delivered. On May 29th he received another policy for 100 hogsheads, 16 of which were delivered on board the *Georgia* the same day. He did not know how much sugar was delivered to the brig whilst she was at anchor, as another officer had charge of that loading.

Andres Suarez, a stevedore, deposed (p. 43) that he stowed the brig *Georgia* in 1880, but could not remember when it was. He recollected having received some sugar from the wharf and some from launches in the bay; he did not remember how many hogsheads he stowed; he did dot see the whole of the cargo loaded. When he left, he thought the vessel would have been fully loaded with 40 or 50 more hogsheads. He was discharged before the vessel was half or entirely loaded.

He only knew he stowed a certain amount aboard the *Georgia;* he did not remember whether he took the state-

ment of the Garcia Brothers as to the amount he stowed. In fact, he did not remember much of anything.

The plaintiffs also read the deposition of *Julio J. G. Gartiez*, taken at Cardenas, Cuba, under a commission issued on behalf of the defendant (p. 47), in which witness stated that on a day in June, 1880, he heard of a vessel being lost on the reef in Cruz del Padre Rey, and procuring permission to render her assistance from the captain of the port, he went to her in a lighter on or about June 18th, and found her lying on the reef on her starboard side in a critical condition. The captain of the *Georgia* would not allow witness to go abroad, and said he didn't want any assistance. Witness remained in the vicinity five or six days. When he first reached the vessel he found one of Vidal & Toraya's lighters already loaded with sugar and anchored off the vessel. Soon afterwards another vessel belonging to the same party came up, went alongside the vessel, and began to load; and three or four days later the lighter *Penelope* belonging to Ramon Quipo came up and went alongside the vessel. Witness then left and returned to Cardenas (p. 48). On June 26th, after the vessel had been stripped and abandoned as a total wreck, he was put in charge of her by the U. S. Consul, and remained in charge of her until she was sold at public auction, her condition all along being critical, when she was bought by the witness for $161.

That he then went to work to get the vessel off, and suspecting a leak, discovered an augur hole of from 1½ inch to 2 inch diameter, surrrounded by several other similar augur holes. He found in her 141 hogsheads, one of which was full of dry sugar, the others containing more or less sugar, which when gathered up filled nine hogsheads.

That when he first saw the *Georgia* she had been lying on the Key two or three days, he was put in charge of her by the Vice-Consul to watch her until the day of sale, for the protection of all interests; that on the day following the sale he went to work to clear off the load, and it took him seventeen days to remove the remainder of the

cargo and to bale her out and put her afloat; that there was a large angur hole in her hull, on the edge of which were several others of smaller dimensions, evidently done to appear as though the vessel had been pierced by some pointed reef (p. 48).

Before this testimony was read the defendant objected to so much of said testimony as stated the condition of the vessel, on the grounds (1) that it was inadmissible as evidence of the condition of the vessel when she sailed from port; (2) if it was offered as evidence of her condition when stripped and lying on the reef, it had no bearing on the case.

Plaintiff's counsel thereupon stated that the evidence was introduced for the purpose of showing the barratry of the master.

The defendant thereupon objected to the materiality of the evidence showing the condition of the vessel days after she was lost, and objected to its being read and moved to strike it out. The motion was denied, and the defendant duly excepted (pp. 48–9).

Tomas Tejedor, one of the plaintiffs, deposed (p. 25) that he had charge of the shipment of the cargo of sugar by the *Georgia* in June, 1880; that on June 21 he received information of a disaster to her and to her cargo by telegram from Julio Rabel, ship broker, at Cardenas, in substance: "The *Georgia* totally lost on the Cruz del Padre Key." That he gave no written instruction to George C. Carson & Co., of Philadelphia, respecting the insurance of the *Georgia* cargo, because there was an understanding between them that all plaintiffs' shipments were covered by Carson's open policy; that the day after she sailed the same class of sugars, as shipped by her, advanced in price in Sagua 5–16ths of a rial per arroba; that after she sailed, on June 20th, *he cabled to Carson to increase the insurance on her cargo; that at such time he had no knowledge, information or suspicion as to any disaster or difficulty respecting the Georgia or her cargo* (p. 26).

On cross-examination, he stated that he personally purchased the sugar and signed the drafts for the same, and that bills of lading were made out and handed to the captain of the *Georgia* for his signature in his office. *That he ordered the increase of insurance on June 20th, and on the 21st, the following day, he received the first information respecting the disaster to the brig and her cargo. He did not, nor did any one to his knowledge, endeavor to increase the insurance after he had heard of the disaster to the brig.* There was a telegram sent from the counting house of his firm, but on the previous day to knowing of the disaster to the brig. *He himself sent the message*, which was written by Thorwald Culmell in the morning of the 20th of June; and he did not receive any intelligence of the disaster until noon of the following day, June 21. That it was not intended to increase the insurance when the brig sailed. The matter of increasing the same was first spoken of in conversation with Culmell after witness had read the Havana reports on the morning of June 20. He had no information whatever at the time of dispatching the telegram concerning the loss of the vessel or of her cargo.

That the receipts for cargo were in the handwriting of *Marcelino Garcia* and his brother Antonio, signed by the mate and officers of customs. He had never seen two sets of such receipts.

The plaintiffs' counsel then read in evidence the telegram to Carson, Philadelphia:

"Market firm. Eight rials. Increase insurance. Invoice *Georgia* twenty per cent.

June 20th. GUARDIOLA."

Also copy of the following telegram:

"Guardiola—

Georgia lost. Too late to increase insurance.

CARSON.

Received June 21, 1 h. 33 P. M." (pp. 28–9).

Jaime S. Guardiola, the other plaintiff, deposed that he had nothing to do with the shipment of the sugar and was in Havana while the brig was being loaded; he did not remember the date on which his house received a telegram from Cardenas stating that the brig and cargo were wrecked, but that this telegram was the first intelligence he received. The first intimation he received in Havana from his house in Sagua was that the *Georgia* was stranded. He remembered there was a rise in the prices of sugar at the time, and his house gave instructions to Carson & Co. after the *Georgia* sailed to increase the insurance. He did not know the date. He believed they were sent by telegram, but was not certain (p. 39).

On cross-examination, he stated that *he* himself bought the sugar shipped on the *Georgia; that he himself whilst in Havana having seen the rise in the market price of sugar of the same class, telegraphed to George C. Carson & Co. to increase the insurance on the cargo on the brig Georgia;* that he thought it was on the following day he received the telegram from his own house in Sagua stating that the brig was stranded; *that he sent the telegram to Carson, which was written by himself before he heard of the disaster to the brig.* He could not state now how long it was before the disaster that he wrote the telegram.

That, as he telegraphed in the name of his firm from Havana, his firm in Sagua received the reply; that a copy of the said telegram had been annexed by his partner to his deposition; that he received his first information that the brig had stranded by telegram from his own house in Sagua; the next notice he received was by letter from his firm confirming the telegram, *and that all this information was received after he had dispatched the telegram requesting additional insurance.* That when he telegraphed to Carson to increase the insurance he had not had any previous conversation with any one, but communicated the substance of his telegram to his own house in Sagua in order that they might confirm it in their correspondence, and that he, being in Havana, had not had any conversation

with his partner or any other person previous to the sailing of the brig respecting increase of insurance (pp. 39, 40).

The plaintiffs' counsel read the following cross-interrogatory:

"*Has it not been stated in your hearing that certain of the cargo or proceeds have been received by some person or persons ?*"

to which defendant objected on the ground that the question called for hearsay evidence. The Court overruled the objection and the defendant duly excepted (*p.* 40).

Plaintiffs' counsel then read the answer to said question, in which witness stated that he had heard no rumor of the cargo or proceeds of the *Georgia* having been received by any person or persons, but that after his arrival in Sagua he did hear that some of the cargo of the *Georgia* had been stolen and that some parties connected therewith were in jail at Cardenas, and that the principal person, Quipo, whom he considered as the principal cause of the disaster, had launches prepared beforehand at the place where the brig stranded, and immediately proceeded to load his launches from the brig, one of which, after being loaded, was taken behind the Key and covered with brushes and that two others had been chartered by Quipo the day previous to the disaster and cleared for Sagua la Chica or Caibarien, at neither of which places they arrived, but returned to Cardenas in the same state that they left, and it is well known that this same Quipo was in good circumstances previous to the disaster, but, whilst in jail, sold his property and with the proceeds of it obtained his liberty; a large portion of which proceeds was paid to and received by the United States Consul at Cardenas, at whose instance he (Quipo) had been put in prison; that Quipo for a long time bore a bad name, and some two years prior to the time of testifying he brought to Sagua a launch laden with hogsheads of centrifugal sugars, which he sold at prices much below the market value of the same class of sugar, and consequently of doubtful origin.

That all the first part of his answers to the interrogatory was rumor, of which he had heard but of which he had not sufficient evidence to prove, but the last part, relative to the sugars brought and sold in Sagua, he knew to be true.

The defendant thereupon moved the Court to strike out the answer to said interrogatory, on the ground that it was shown to be purely hearsay evidence, and furthermore, separately, to strike it all out, except such parts as the witness stated was of his own personal knowledge.

The Court denied the motion, and the defendant duly excepted.

The deposition of *G. Ashton Carson, taken on behalf of the plaintiffs*, was read, in which witness stated that he was a shipping and commission merchant in Philadelphia, and had for many years been the consignee of the cargoes of the plaintiffs.

He received a telegram from the plaintiffs *on June 21st*, 1880, instructing him to increase insurance invoice *Georgia* twenty per cent. This was the first information he had of the *Georgia* coming. He did not know of her loss (p. 50).

He went with this telegram to the insurance company, and they endorsed the risk, leaving the value blank, and *at the same time informed him that the Georgia was lost.*

He then telegraphed to the plaintiffs that fact, and that it was too late to increase the insurance.

Afterwards he received a letter from them, enclosing the bill of lading and invoice, from which the figures were filled in to complete the endorsement on the policy; that the plaintiffs inclosed to his firm, by letter of June 14th, certain drafts, amounting to about $38,000, requesting them to protect the same, which they did (p. 50).

Correspondence between Carson & Co. and the plaintiffs was also introduced in evidence by plaintiffs, and will be found on pages 50–56 of the printed record.

The plaintiff then rested.

On behalf of the defendant, upon the question of the amount of cargo on board the vessel, Frank W. Carlsen, Carl Olsen and Oswald Thorsen, three of the crew of the *Georgia*, testified orally in Court substantially to the same effect, that they assisted in stowing the vessel; that the first two lighter loads were stowed by stevedores, but the rest, about three lighter loads, were stowed by the crew; that the vessel was badly stowed, the cargo being piled up in some places to the deck and in other places only two or three hhds. left; that between decks there were only 21 hhds. of sugar, and the vessel would take there 130 to 135 all told; that they knew the latter fact, because they had to take out the smallest hhds. to get them between-decks; that the hold was stowed badly and would have taken between 60 and 80 hhds. if properly stowed. That the *Georgia* sailed from Sagua in fine weather and kept along the coast (which was out of their course), and the vessel began to leak and was leaking all the time and all hands were kept pumping. About twenty-four hours after she sailed she ran ashore; it was in fine weather, six o'clock in the morning. They struck first very light, and the moment they struck, the mate gave orders to clew up the sails and hoist the cargo gaff, and they hoisted up four hhds. of sugar and rolled them overboard; three of them sunk and one floated. Only four hogsheads were thrown over. There were lighters in sight at that time. One of the lighters came alongside and the captain made some arrangements with its master, and the remainder of the cargo was, from time to time, discharged into the lighter.

The crew discharged so much of the cargo as was discharged.

It took from half to three-quarters of an hour to get out the four hogsheads mentioned, because they were piled upright and they had to hook them on and unship the gangway and roll them overboard. The crew finally went to Cardenas where the captain ran away (pp. 66, 68–71 to 73).

On cross-examination the witness *Carlsen* said that he did not know how many hogsheads were brought off to

the *Georgia* in the first load, or the second, third or fourth; that in either the fifth or sixth 21 or 22 hogsheads came aboard.

That the hogsheads were not all the same size; that they picked out the small ones and put them in between-decks —21 hogsheads.

Thorsen testified that when the vessel was lying at anchor in the bay at Sagua a lighter would come alongside, and only part of her cargo would be taken on the *Georgia*, and part would go to some other vessel. Of the last load, as he remembered, they only got 21 hogsheads, the rest went to another vessel; that there were several other vessels in port at the time, among others the brig *James McCarthy*, of Portland, to which he saw the lighters go on occasions from the *Georgia*. That as the ship was laden when she struck, it would have taken several hours to have thrown 100 hogsheads overboard (which was necessary to account for the entire cargo).

Skiffington Dodds was then called, and testified that he was mate of the *Georgia* in 1880. He identified the five receipts introduced in evidence by the plaintiff, signed by him, and stated that those dated June 4, June 5, June 9 and June 14 were false receipts; that they were brought on board to him by Captain Welsh, signed by him and taken back again on shore by Captain Welsh; that he had given true receipts to the lightermen of the amount of cargo received from them and the false receipts were brought aboard by the captain, signed by him and returned to the shore by the captain. That they took in at the wharf 216 hhds., for which he gave true receipts and made entries in his log book; they then went to the bay where they took in more cargo; that on one day they took in *36* hhds. for which he gave a true receipt to the lightermen, and that same evening the captain brought him a duplicate receipt which was made out for *86* hhds. and which he signed and returned to the captain; that that was one of the receipts offered in evidence by plaintiffs, namely, the receipt for *86* hhds., dated June 4, 1880. He actually received on that day only *36* hhds. On the next day he received, he

thought, 22 or 24 hhds., and gave a true receipt for the same; afterwards he gave to the captain a false receipt for seventy odd, seventy-three or something like it. Being shown the receipt dated June 9th, for 78 hhds., he said he thought that must be the one he meant.

On that day he receipted for 22 or 24 hhds. He was not certain which, as there was one day he received 22, another 24, and another day 20.

He was shown the receipt dated June 5, for 53 hhds. and one tierce, which he stated was a receipt for one of the days on which he received either 22 or 24 hhds.; that his last true receipt he gave was for 20 hhds., for which he substituted a false receipt for 48; *that 163 hhds. in all were not delivered*, for which receipts were given by him in the form he stated; that all the sugar that was delivered on board the vessel prior to her sailing was that specified in the true receipts, and the difference between the amounts in the true receipts and the false receipts was not delivered on board the vessel.

He recollected the coming of the launch from time to time. Cargo was taken by the launch from the *Georgia* to other vessels in the harbor on three occasions. He knew there was one vessel, a lead colored bark, and another a brig, but he could not remember their names. He saw the launches go and deliver part of the cargo on board these vessels. That the *Georgia* drew 12½ feet of water when she left Sagua. She would draw, if full, about 14 feet, or a few inches more.

They left Sagua about daylight in the morning, and went ashore just after sunrise on the next morning.

After they went ashore four hhds. of sugar were thrown overboard. There were then two lighters in sight, one of which came alongside of the *Georgia*, and a man went into the cabin and made some arrangements with the Captain, and the Captain ordered the cargo to be discharged into the lighters. Witness remained until all of the cargo was discharged and the ship completely stripped, which took about a week; he then went to the Consul's office in Cardenas, and made a statement before the

Consul. The Captain began to make a statement which he never completed, but ran away (pp. 73–76).

On *cross-examination*, the witness admitted that the receipts which were given by him to the lighter men to be taken ashore were for the purpose of having bills of lading made up from them, and he knew it. The false receipts were signed by him and given to the Captain aboard the ship.

He did not *know* that the captain would take them ashore—of course he thought he would—to represent that the vessel had more sugar in her than what she got aboard; he knew that the bills of lading would be made upon these, and yet he gave a false receipt, and knew they were false when he gave them. He knew it was dishonest when he gave them. He made a memorandum of these weights and of the hhds. of sugar as he received them, and also of those that were in the receipts. He kept a memorandum both of the true and false receipts, so that he could make up the log book, and for his own use, which he gave to the American Consul in Cardenas. From the 4th of June until the 14th he kept on giving false receipts, knowing that a conspiracy was afoot to defraud somebody. He did not know who it was to defraud and he had received no money, and no money in the case except $50 from the insurance company since his arrival in New York, to pay his hotel expenses (p. 78).

George W. Brown, an insurance agent, testified (p. 64) that he had been a sea captain for ten years and was familiar with the port of Sagua and the port of Cardenas, and had seen the wharf of Moré, Ajuria & Co., at Isabel de Sagua. That he was in Sagua in 1880 while the *Georgia* was at the wharf; that the wharf was 1,400 or 1,500 feet long; that he had seen the steamer *Esperanza;* she was a steam lighter, decked over with a hatch pretty well forward on the main deck, eleven by fourteen feet; that one could only see perhaps not to exceed 15 to 20 hhds. standing on the wharf, if she was not loaded. That the bark *James McCarthy* and the brig *Annie W. Storer* and the brig *Arcadian* and some other vessels were lying in

the port of Sagua in the months of May and June, 1880, while the *Geargia* was loading. That the *James McCarthy* was a bark, painted a very light brown, nearly white —light cream color. That while at Sagua he saw and had access to the receipt book of Marcelino Garcia, one of the witnesses.

Defendants' counsel then asked the witness:

"Q. Did you see in that receipt book any receipt for cargo upon the same date as some of these shipments were made, on the identical dates, made by the *James McCarthy?*"

To which the plaintiffs, by their counsel, objected as proving the contents of a book by a witness who simply saw it; that the book or copy of it should be produced.

The defendants then offered to prove that in the book of Garcia, who was the plaintiff's own shipper, there were receipts for cargo sent by the *James McCarthy* on the same date. That the witness saw receips in the books of Garcia —receipts on the same day that cargo was shipped by the *Georgia*—for cargo by a vessel consigned to the practical plaintiffs in this suit (Louis Monjo, Jr., & Co., p. 85).

Plaintiffs objected to the proof offered, and the Court sustained the objection and excluded the testimony, to which the defendant duly excepted (p. 65).

The defendant then read the deposition of *Joseph H. Washington*, taken at Cardenas, Cuba, on commission, in which the witness testified that he was United States Vice-Consul for the port of Cardenas, and had been so since 1879; that on June 17th, in the afternoon, he first learned of the wreck of a vessel on the Cruz del Padre reef, which on the following day was known to be the American brig, *Georgia*. That he saw the vessel on June 22d, having accompanied the surveyors who went to examine her. She was lying about 100 yards from deep water in a break in the reef, in about 10 feet of water; he had known the brig *Georgia* since 1873, and would reckon her to draw from 14 to 15 feet according as she would be loaded with sugar or molasses. On her port side there was from 9 to 10 feet

of water and on the starboard side, 6 or 7 feet. In his opinion, had the *Georgia* been fully loaded *she would not have entered the break on the reef; because where the break begins at the line of deep water there is from* 10 *to* 12 *feet of water only.* That there was saved from the *Georgia* 166 hogsheads in 2 lighters brought by the Captain in more or less damaged condition. That there were 57 hogsheads of sugar that were stolen by Ramon Quipo in his lighter called the *Penelope*, which were recovered through witness' efforts, by Marcos Planells, to whom salvage was paid for the recovery of the same. There were likewise saved by *Julio Gartiez* after he had bought the wreck of the brig at public auction, from 10 to 11 hogsheads of sugar in more or less good condition. These were all the sugars saved from the brig (p. 61).

That the hogsheads saved from the *Georgia* were brought to Cardenas, 166 hogsheads were stored in the warehouse of Vidal and Toraya and the 57 stolen and afterwards recovered were also stored and were shipped later to New York consigned to Carson & Co. There were saved and shipped 223 hogsheads.

That when he first heard the name of the vessel that went ashore, and particulars, etc., he immediately telegraphed to the Underwriters' agent the particulars in his possession.

Within a few days after the vessel was ashore it began to be rumored that there had been fraud committed in connection with the loss, and Thomas F. Wilson, United States Consul at Cardenas, determined to arrest Captain Welsh, the master of the brig. On taking out the warrant of arrest it was found that the Captain had absconded in the morning of the same day, and they could not find him.

Ramon Quipo was also arrested as an accomplice and brought to the United States Consulate, and there examined by the consul and the witness. He confessed to them the robbery of 57 hogsheads of sugar that had been taken upon his lighter, and offered to return the sugar, but refused to name his accomplices in the fraud at Sagua,

accusing the Captain as an accomplice, but would not divulge the names of his accomplices in Sagua, where the matter had been arranged.

Witness did not know personally how many sugars were shipped at Sagua, but by the testimony of the mate, taken before the consul and himself there were only 368 hogsheads.

Cardenas was distant from Sagua la Grande between 6 and 7 hours by rail, and there was communication also by water and by telegraph (p. 62).

The defendant also read the deposition of *George L. Washington*, taken at Cardenas under a commission issued in the cause, in which the witness stated that in June, 1880, he was United States Vice-Consul at Matanzas, and also insurance agent. He first learned of the wreck of the *Georgia* by advices from his sub-agent, Joseph H. Washington, on June 19th or 20th ; that there was saved from the wreck 223 hogsheads, of which 166 came direct to Cardenas and 57 were found secreted on a lighter called the *Penelope*, the property of one Queipo (p. 63).

The defendant also read the deposition of *Marcos Planell's*, taken at Cardenas under a commission, in which the witness stated that he was a stevedore and resided in Cardenas; that there were two lighters hidden in the inns and outs of Key Blanco, and right in the vicinity where the stranding took place, and which made for the vessel and reached her side, a few moments after she was run ashore.

It was about sunrise when the witness from the deck of a steamer he was stowing discovered the brig *Georgia,* and the lighters going to her.

Evidently she was not full at the time of her loss, according to the statement of the men in the lighters alongside of her taking cargo who informed him of this fact, he judged that some cargo had been taken out of her previous to her stranding, the between deck being in complete confusion, with casks with heads or bottoms out and much sugar strewn about (p. 64).

The testimony of *Thomas F. Wilson* was read in evi-

dence by defendants from the minutes of his examination at a former trial of this case, in which the witness testified that he was in June, 1880, U. S. commercial agent at Cardenas. He first heard of the wreck of the *Georgia* in the afternoon of June 16th or 17th. He first saw the Captain of that vessel on the afternoon of June 19th, when he presented himself with a man named Quipo, reported the loss and made a note of protest before him. Witness identified the protest put in evidence by the plaintiffs in this case as the one referred to and explained that a note of protest is made by the Captain only when he first arrives at a port. If he has had stress of weather, or accident, he notes a protest with the consul in order that he may afterwards extend or complete his protest when he ascertains the actual damage or when ascertained by a surveyor, if such occur.

The protest as a rule is made by the Captain, the first or second mate, the carpenter usually, and one of the crew, or in the absence of the carpenter, two of the crew, with the mate.

Being asked if a complete extension of this protest was ever executed, he replied that there was an attempt to extend it, that in his opinion the protest was extended so far as the mate and seamen went, leaving out the Captain.

The reason that the extension of the protest failed was that the Captain, having presented the mate, the cook, and the crew to extend the protest, the examination went on in the regular order of extending the protest, according to the forms given to witness by the Government, but the mate and crew differed from the Captain as to the amount of cargo on board and also as to the amount of cargo thrown overboard and the seaworthiness of the vessel. The Captain then fled, and his protest was not completed (pp. 78–9).

The defendants also read in evidence the deposition of *Thorwald Culmell* from the minutes of his examination at a former trial of this case, in which the witness testified that in 1880 he was foreign corresponding clerk in the employ of the plaintiffs; that he recollected a telegram

which was sent to Carson & Co. to increase the insurance, which was written and sent by him. There was a telegram received from Cardenas on a Sunday morning; he could not state the exact date; that is, the exact day of the month, but he was positive it was a Sunday morning. He received this telegram from Ravel in the morning before breakfast; the telegram stating the loss of the *Georgia*, and he sent the telegram to Mr. Tejedor who was at his house. Witness sent the telegram to Carson to increase the insurance, owing to instructions from Mr. Tejedor. These instructions were in writing, in Spanish. The original was produced and witness read a translation of the same to the jury. It was as follows:

"Mr. Culmell: If the invoices of the *Georgia* have not "arrived in the United States, I think we can telegraph "to Carson to insure the cargo at a better price, since to-"day at the low invoice we would lose money on the "cargo. Telegraph to Ravel thanking him for the infor-"mation, also to Don Jamie informing him of what has "happened to the *Georgia*. Yours, Tejedor."

That, he said, was Mr. Tejedor's order to him to send the telegram to increase the insurance, which was in Tejedor's handwriting, and in response to these instructions he sent the telegram to Carson requesting an increase of insurance (p. 80).

Witness generally made out the invoices. He made out the prices as a rule. He did on this invoice. He made them generally at the market prices at Sagua at the time.

He did not think that Tejedor came to the office and saw the telegram before he despatched it. He knew they had a conversation with Tejedor afterwards in regard to the loss of the vessel, and the propriety of sending the telegram, but he thought the telegram was sent without his seeing it (p. 81).

On cross-examination he stated that it was the custom all over the world with regard to sending cargoes, to insure them ten per cent. over invoice value; this ten per cent. being to pay the condition charges and the profits on

the goods. He was not aware that the house ever insured at twenty per cent. above the rate.

He did telegraph to Ravel thanking him for the information on the same day. He also telegraphed to Mr. Guardiola, to Havana. He did not receive an answer (pp. 83–4).

The defendant having rested, the plaintiffs, in rebuttal, offered in evidence five letters annexed to the deposition of Tomas Tejedor, written to plaintiffs by Garcia Bros., dated May 26th and 29th, and June 8th, 9th and 14th, 1880, purporting to be reports from Garcia Bros., plaintiff's shipping agents, as to the progress of shipments on the *Georgia* and other vessels from day to day, and stating the amount of cargo loaded (see p. 85), *to which letters defendant objected that they were incompetent and irrelevant. The Court overruled the objection, and the letters were admitted and read in evidence, to which ruling the defendant duly excepted.*

It was agreed by counsel for the respective parties that the value of 163 hogsheads of sugar at the rate of the valuation in the policy, with interest to date of trial, was $17,530.11 (p. 86).

Upon all this testimony when the evidence was closed the defendant by its counsel asked the Court to direct a verdict for the defendant, which motion was denied and the defendant duly excepted (p. 86).

The Court submitted to the jury the questions as to the sea worthiness of the vessel and as to whether the vessel when she started upon her voyage had 532 hogsheads of sugar on board.

The change is given *in extenso*, the substance of the charge leading the mind of the jury to find wholly for plaintiff or defendant.

The Court further charged "*If you find in favor of the plaintiffs, then your verdict will be for* $17,530.11." To this portion of the charge the defendants' duly excepted, on the ground that it was the province of the jury to find a verdict for the value of any amount of sugar which they might determine to have been on board the vessel (p. 96).

The Court also charged the jury substantially that if they believed the defendants' witnesses as to the short cargo, the plaintiff must be presumed active parties to the fraud. The jury found for the plaintiffs in the sum of $17,530.11, upon which judgment was entered (p. 19).

Assignment of Errors.

The plaintiff in error respectfully submits that the Trial Court erred in the following rulings :

I.—In admitting in evidence a copy of a memorandum prepared by Felippe Obeso, and annexed to his deposition, purporting to give the weights of 48 hogsheads of sugar stated to have been weighed by him and delivered to the launch *Trillo* to be carried to the *Georgia*, a copy of which is annexed to the bill of exceptions, marked Exhibit A (Record, p. 22).

II.—In denying defendant's motion to strike out the said memorandum (*Id.*, p. 23).

III.—In admitting in evidence a copy of a memorandum prepared by Gabriel Garcia, and annexed to his deposition, purporting to give the weights of 324 hogsheads of sugar stated to have been weighed by him at the stores of More, Ajuria & Co., by direction of the plaintiffs, and shipped on board the *Georgia*, a copy of which is annexed to the bill of exceptions, marked Exhibit B (Record, p. 98).

IV.—In denying defendant's motion to strike out so much of the testimony of the witness José P. Ferreria as related to the number of hogsheads shipped either on

board the launch *Esperanza* or on board the launch *Trillo* for the *Georgia*, to wit:

"That he saw delivered from the said wharf to the "launch *Esperanza* on June 3d, 1880, 50 hogsheads of "sugar; on June 4th, 86 hogsheads; on June 5th, 53 "hogsheads and 1 tierce; on June 9th, 78 hogsheads; "all destined for the brig *Georgia;* and on June 14th "he saw delivered 48 hogsheads from the steam launch "*Trillo* to the said steam launch *Esperanza* for the "*Georgia.*

* * * * * * * *

"That when the *Trillo* delivered the 48 hogsheads "to the *Esperanza* he was not on board either of the "launches, but observed all the operations of transferring "the 48 hogsheads from the wharf where he stood, the "launches at the time being alongside the wharf" (Record, pp. 34, 35).

V.—In admitting in evidence a copy of a memorandum prepared by Gerome Bañasco, and annexed to his deposition, purporting to give the weights of 368 hogsheads of sugar which, he stated, he saw weighed at the warehouse of Moré, Ajuria & Co., at the boca, and delivered to Guardiola & Tejedor; a copy of which is annexed to the bill of exceptions, marked Exhibit E (Record, p. 102).

VI.—In denying defendant's motion to strike out all the evidence of Gerome Bañasco concerning the weight of the sugar, to wit:

"That in all, he was present and saw weighed 368 hogsheads of sugar, having a gross weight of 679,380 lbs." (Record, p. 37).

VII.—In overruling defendant's objection to the fifteenth cross-interrogatory propounded to Jaime S. Guardiola and read by the plaintiffs, viz.: "Has it not been stated in your hearing that certain of the cargo or pro-

ceeds has been received by some person or persons?" (Record, p. 40).

VIII.—In denying defendant's motion to strike out the answer of Jamie S. Guardiola to the said fifteenth cross-interrogatory, to wit: "That he had heard no rumor of "the cargo or proceeds of the brig *Georgia* having been "received by any person or persons, but after his arrival "in Sagua he did hear that some of the cargo of the brig "*Georgia* had been stolen, and that some parties con-"nected therewith were in jail at Cardenas, and that the "principal person, Quipo, whom he considered the princi-"pal cause of the disaster, had launches, prepared before-"hand, at the place where the brig stranded, and imme-"diately proceeded to load his launches from the brig, "one of which, after being loaded, was taken behind the "Key and covered with bushes, and that two other "launches had been chartered by Quipo the day previ-"ous to the disaster and cleared for Cairbarion or Sagua "la Chica, at neither of which places they arrived, but "returned to Cardenas in the same state that they left, "and it was well-known that this same Quipo was in "good circumstances previous to the disaster, but whilst "in jail he sold his property and with the proceeds of it "he obtained his liberty, a large portion of which pro-"ceeds was paid to and received by the United States "Consul at Cardenas, at whose instance Quipo had been "put in prison.

"That this same Quipo for a long time bore a very "bad name, and some two years prior to the time "of testifying, more or less, he brought to the port "of Sagua a launch laden with hogsheads of centri-"fugal sugars, which he sold at prices much below "the market value for the same class of sugar, "and consequently of doubtful origin. That all the "first part of his answer to the interrogatory was rumor "which he had heard and which he had not sufficient evi-"dence to prove; but the last part, relative to the centri-

" fugal sugars and brought and sold in Sagua, he knew to " be true." (Record, pp. 40-1.)

IX.—In denying defendants' motion to strike out all of the foregoing answer of Jamie S. Guardiola except such parts as the witness stated were of his own personal knowledge, that is, all except the statement that Quipo some two years before the time of witness' testifying brought to the port of Sagua a launch load of sugars which he sold at prices much below the market values of the same class of sugars.

X.—In denying defendants' motion to strike out the testimony of Julio J. G. Gartiez relating to the condition of the *Georgia*, to wit:

" That he examined her hull, which he found appa- " rently good and staunch, but when he went to work to " get the vessel off, after minute observation, especially " after the ebb and flow of the tide, he suspected a leak, " which, on careful examination, proved to be an augur " hole of from one and one-half to two inches in diameter, " surrounded by several other smaller augur holes. * * * " That there was a large augur hole in the hull of the " *Georgia*, on the edge of which were several others of " smaller dimensions, evidently done to appear as though " the vessel had been pierced through by some pointed " reef." (Record, p. 48.)

XI.—In overruling defendants' objection to a question propounded by plaintiff's counsel to the witness Platt, to wit:

" Did you say to Carson that you would insure no more " cargoes for Guardiola & Tejedor?" (Record, p. 60.)

XII.—In overruling the defendants' offer to show by George W. Brown that in the books of Garcia, the plaintiff's shipper, there were receipts for cargo sent from Sagua

by the brig *James McCarty* on the same date as some of the shipments by the *Georgia*, and that the witness saw receipts in the books of Garcia bearing date the same day that cargo was shipped on the *Georgia* for cargo consigned by Garcia Brothers to the practical plaintiffs in this suit, and in excluding said proof. (Record, p. 65.)

XIII.—In overruling the defendants' objection to, and admitting in evidence certain letters annexed to the deposition of Tomas Téjedor, being letters from Garcia Bros., factors and agents at the Boca to Guardiola & Tejedor, to wit: a letter dated May 26, 1880, stating that the *Georgia* had "commenced her cargo, taking only 72 hogsheads Maria Antonio. Garcia is employed in classifying the sugars. His marks and enumerations conform to his instructions. To-morrow he will continue loading, which will be continued without interruption until she has her complement." A letter, dated May 29, 1880, stating that the *Georgia* had sheared off with 216 hogsheads of Archè. A letter, dated June 8, 1880, stating that they were expecting 100 hogsheads of Union intended for the *Georgia;* that "we lack to-day 125 hogsheads to 130 hogsheads to finish. If all are 36 the Captain says that 126 will be enough, and with them she will have 532 hogsheads and 1 tierce." A letter, dated June 9, 1880, stating that "the steamer *Esperanza*, with 78 hogsheads aboard, counting which there are 483 hogsheads and 1 tierce aboard. This lacks 48 hogsheads to finish, and with that to make 531 hogsheads and 1 tierce. * * * * As soon as the steamer *Esperanza* returns from the *Georgia* we will load her with 101 hogsheads and 1 tierce of San Antonio, which Garcia weighed and marked V 25 L 1-11; and a letter, dated June 14, 1880, stating:

"The captain goes by this train. He carries 531 hogsheads and 1 tierce. His expenses are * * *" (Record, p. 84).

In overruling defendant's objection to each and every of said letters separately—

XIV.—In charging the jury, referring to the testimony of Dodds, the mate: "Of course, if taking his testimony in "connection with the other testimony in the case that you "say he has told the truth here, then there is no escape "from the presumption that these plaintiffs were parties "to thefraud, and of course they cannot recover," taken in connection with the refusal of the Court to charge the jury as requested at folio 207, that if the sugar was not placed on board by reason of a conspiracy with Garcia, or from any other source, still plaintiffs could not recover.

XV.—In charging the jury: "If you find in favor of the plaintiffs, then your verdict will be for $17,530.11." It being the province of the jury to find a verdict for the value of any amount of sugar which they might determine to have been on board the vessel."

JOHN L. CADWALADER,
Counsel for Plaintiff in Error.

Argument.

I.

First and Second Assignments.

(1.) The Court erred in admitting in evidence the memorandum of the number and weights of 48 hogsheads of sugar annexed to the deposition of Felipe Obeso (p. 22). It was merely a copy, the original being contained in a book belonging to the plaintiffs in their store at Sagua, Cuba. It did not even appear that the copy was made by the witness, nor did he say that it was a correct copy.

In *Comstock* vs. *Cushman*, 4 Blatch. C. C. R., 59, the deposition of a witness taken *de bene esse* before a U. S. Commissioner in a distant State was read, and a copy of a contract which the witness testified was a correct copy

was annexed to the deposition and admitted in evidence on the trial. This was held error, and a new trial was ordered on account thereof, *Nelson*, J., saying: "I think "the proof produced incompetent. It was no higher than "parol evidence of a written instrument, the original of "which was in existence. The original was in the hands "of the railroad company (one of the parties to the con-"tract), where, as I understand from the deposition, Jack-"son examined it, and procured a copy which he produced "before the Commissioner. *The original should have "been produced and proved before the officer, and he "should have annexed a true copy in returning the deposi-"tion to the Court.* Or, if Jackson could not have ob-"tained the original, it was competent to examine the "officers of the company in whose custody the paper was." Steinkeller *v.* Newton, 9 Carr & P., 313.

This is but the application of the familiar rule that until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is, in general, admissible (Greenleaf on Ev., § 84; 1 Taylor on Ev., § 428). The distant residence of the party affords no excuse for the non-production of the original document (*Furman* v. *Peay*, 2 Bail., 391).

(2.) It affirmatively appeared upon the cross-examination that the original book was in the possession of the plaintiffs, and the motion to strike out the evidence contained in the copy should have been granted on that account.

II.

Third and Fifth Assignment.

(1.) The Court erred in admitting in evidence the memorandum of weights attached to the deposition of Gabriel Garcia, (Record, p. 23), and that attached to the deposi-

tion of Gerome Bañasco (p. 37). Each was a copy; the originals were not produced before Commissioner, nor such non-production excused. It was therefore error in each case to admit the copy in evidence upon the ground stated *supra*.

(2.) They were also inadmissible on a further ground. The witness in each case used the memorandum to refresh his recollection as to dates and numbers, and then testified from memory (Record, p. 24 and 36). The writing was inadmissible in evidence to corroborate the witness' testimony.

Flood *v.* Mitchell, 68 N. Y., 507.
Sackett *v.* Spencer, 29 Barb., 188.
Wightman *v.* Overhiser, 8 Daly N. Y. C. P., 282.

III.

Fourth and Sixth Assignment.

(2.) The testimony of José P. Fereria as to shipments of a specified number of hogsheads on particular days, upon cross-examination proved to be nothing but hearsay (pages 34–35). He admitted that he did not speak from memory, but from a memorandum which he held in his hand at the time of testifying—and even that was only a copy, the original being in the Custom House. He had no independent recollection. Neither the original memorandum nor the copy was annexed to the deposition. The testimony was therefore entirely inadmissible.

1 Greenleaf on Ev., § 437.
1 Phillips on Ev., *p. 230.

(2.) So, on the cross-examination of Gerome Bañasco, it appeared that the testimony he had given on his direct-examination as to the number of hogsheads he had seen

weighed was derived from memoranda made by other parties, and that he had no personal knowledge of the subject (p. 37 and 38). His testimony on that point was therefore merely hearsay and should have been stricken out.

To cure the error of admitting illegal evidence upon a trial the evidence should be stricken out and the jury distinctly instructed to disregard it.

Alexander *v.* Osborn, 21 N. Y. W. Digest, 299.

Hinckley *vs.* R. R. Co., 56 N. Y., 434.

First Unitarian Socy. *v.* Faulkner, 91 U. S., 415–418.

In *Hinckley* vs. *N. Y. C. R. R. Co.*, oral evidence was given on behalf of the plaintiff to show an agreement between the parties as to the carriage of certain goods by the defendant company; afterwards a written contract on the subject was proven, and the defendant moved to strike out all of the plaintiff's testimony which contradicted or was in conflict with the written agreement. The Court denied this motion. This was held error, for which the judgment was reversed and a new trial awarded.

In *Unitarian Society* vs. *Faulkner*, conversations of a third party were admitted in evidence over the defendant's objection and exception, on the assurance of counsel that they expected to prove that such third party was the agent of the defendant. This was not however done, nor was the attention of the Court afterwards called to the subject. It was held that the error must be disregarded, as the defendant could not remain silent and suffer an error to be committed by the Court in order that he might have a valid exception if the verdict were in favor of his adversary; but it was distinctly intimated that if the attention of the Court had been called to the failure to connect, the evidence should have been stricken out.

IV.

Seventh, Eighth and Ninth Assignments.

The Court erred in admitting the interrogatory propounded to the witness Guardiola, "Has it not been stated "in your hearing that certain of the cargo or proceeds "has been received by some person or persons?" The question clearly called for hearsay evidence, and the answer was a mass of rumor calculated under the circumstances to seriously affect the jury. The answer is given in full in the assignment. It is certainly not necessary to argue that mere statements which the witness might have heard as to the receipt of the cargo were not evidence. The plaintiff was in the position that the mate's receipts called for 163 more hogsheads than proved to be on board when the vessel struck. They thereupon by this testimony endeavored to show that some was stolen.

It was also serious error to refuse to strike out upon the defendant's motion the statements volunteered by the witness in reply to the interrogatory just quoted. These statements were not responsive; they were, admittedly, mere "'rumor," which the witness said he had heard, and they tended distinctly to prejudice the jury against one of the defendant's witnesses and to suggest to their minds a theory of reconciling the fact that only 368 hogsheads of sugar could be traced as coming out of the *Georgia* after she struck, with the idea that 531 were loaded upon her, which theory had no support in the evidence.

In Fowler *v.* Howe Machine Co., 20 N. Y. W. Dig., 520, an action for services rendered the defendant, the plaintiff sought to prove that one J. was general agent and manager of defendant's business, and while acting in that capacity he engaged plaintiff to enter defendant's service at a fixed salary.

Plaintiff having testified that he had an interview with J. the day before he began his service, was asked: "State

what conversation you had with him on the subject of working for the company?" Defendant's objection thereto was overruled and an exception noted. The witness answered. "He asked if I would like to work for the company. He said he was superintendent for the State of New York." Defendant objected to the statement as not competent and moved that it be stricken out. The Court overruled the objection and denied the motion to strike out, and defendant excepted. There was no other evidence as to J.'s agency.

On appeal, the New York Supreme Court, at General Term held (four judges concurring) that the denial of the motion was error, for which the judgment must be reversed and a new trial had. That as the witness volunteered the evidence, the motion was proper and the only way to expunge the same from the record. That the statement was not competent evidence of J.'s agency, but mere hearsay.

V.

Tenth Assignment.

The Court erred in admitting the testimony of the witness Gartiez as to the augur holes found in the hull of the *Georgia* seventeen days after he had purchased her, and some twenty-seven or eight days after the stranding of the vessel. Such evidence was clearly inadmissible to prove that she was wrecked by the barratry of the master. It was entirely too remote. It was not accompanied by any proof tending to show it was not done after she was lost.

VI.

Eleventh Assignment.

The question asked Mr. Platt, the president of the defendant company, whether he had said to Carson that he would insure no more cargoes for Guardiola & Tejedor had reference to a conversation occurring after the loss of the vessel and the fixing of the liability, if any, of the company, and was not relevant to any of the issues. It tended merely to create a prejudice against the defendant company, in the minds of the jury, as being desirous of injuring plaintiff's business.

VII.

Twelfth Assignment.

The facts offered to be proven by the witness Brown as to having seen entries on Garcia's books of shipments to other vessels on the same day cargo was sent to the *Georgia* were material to the issues in the case. The defendants did not deny that all of the cargo said to have been shipped on the *Georgia* was actually loaded on the launch *Esperanza* as testified to on behalf of the plaintiff; but four witnesses testified for the defendant that only *a portion* of several of the launch loads was placed upon the *Georgia*, and the remainder was carried to other vessels. The evidence in contradiction of this, aside from the mate's receipts, which he testified were for false amounts, consisted only in the statement of Gabriel Garcia, the plaintiff's sugar weigher, that he, standing upon the wharf, and engaged in weighing and loading sugars, saw the launch go to the brig *three miles* away, on five separate days, and saw her unload her entire cargo and return without going to any other vessel (pp. 23–4)—which, according to the only other witnesses who testified on the subject, was impossible for him to have seen (pp. 33, 35, 37, 64); Antonio Jorge, the captain of the *Esperanza*, whose testimony was entirely

based on the mate's receipts; and the vague recollection of Ferreria, the customs officer, who also tesified from a memorandum made up for the purpose. There was uncontradicted evidence that the barque *James McCarthy*, of Portland, was lying in the bay near the *Georgia* while the latter were loading (pp. 72, 64), and *Thorsen*, one of the crew, testified that lighters went with portions of the cargo to her from the *Georgia* (p. 73). If the books of Garcia, the plaintiff's agent, had been shown to contain receipts for cargo shipped on the same dates as the shipments to the *Georgia* it would have been a material circumstance, the influence of which upon the minds of the jury in reconciling much of the testimony which might otherwise be considered conflicting, and the effect of which can hardly be overestimated.

The offer to prove these facts being made and rejected and exception duly taken, the appellate Court must assume that the proof could have been made if allowed.

Scotland County *vs.* Hill, 112 U. S., 183.

The only objection made by the plaintiffs to the testimony was that it was proving the contents of a book by a witness who simply saw it; that the book or a copy should be produced (p. 65).

The answer to this is: (1) the book was in the possession of the plaintiffs' own agent, and the testimony as to other portions of it had already been given on behalf of the plaintiffs (pp. 33, 23–4), and a copy of a portion of the entries in said book annexed to the deposition of Gabriel Garcia and read in evidence (p. 25).

(2) The book was in a foreign country, beyond the jurisdiction of the Court, and beyond the power of the defendant to produce, not being in the possession of or the control of the defendant.

In Burton *v.* Driggs, 20 Wall., 125, the deposition of a witness, taken *de bene esse*, as to contents of the books of a bank in another State, not a party to the suit, was admitted in evidence. This was held to be regular. "The "books being out of the State and beyond the jurisdiction

" of the Court, secondary evidence to prove their contents " was admissible."

Besides, the Court appears here to have denied to the defendants the latitude as to proving the contents of books and papers which had been too freely accorded to the plaintiff (see *supra*).

VIII.

Thirteenth Assignment.

One of the most serious errors committed by the Court upon the trial was in admitting in evidence, in rebuttal, five letters purporting to be written by Garcia Brothers, the plaintiffs' agents at the Boca, to the plaintiffs, between May 26th and June 14th, containing statements as to the number of hogsheads shipped on the *Georgia* (see Record, p. 85).

They were clearly incompetent against the defendant, being *res inter alios actæ*, and therefore amounting only to hearsay.

1 Greenleaf on Ev., §§ 99–100.

This exception falls directly within the decision of this Court in *Dwyer* v. *Dunbar*, 5 *Wall.*, 318, where it was held that a letter to a third person, appended to a deposition, and professing to give an account of a particular transaction, but not sworn to in the deposition to have given a true account of it, was not admissible as a part of the deposition, or at all.

The Court say, per Swayne, *J.*: "The letter itself was clearly not evidence. There being no proof of the truth of its contents, it was within the definition of *res inter alios acta*. It was simply a narrative to a third person of a past transaction, in relation to which the writer was a competent witness and gave his deposition."

The argument upon the exception under consideration could not be more forcibly and succinctly presented than in the words just quoted.

Moreover, these letters were plainly and distinctly offered as separate pieces of evidence, disconnected with any testimony. No claim can therefore arise that they were offered for any other purpose than as proof *of the facts* therein stated.

In Porter *v.* Parks, 2 Hun (N. Y. Sup. Ct.), 655, it is held, "Letters from an agent to his principal cannot be "given in evidence against a third person." Also see

1 Cow. & Hill, 565.

IX.

Fourteenth Assignment.

The Court had charged (p. 93) that if the jury believed the testimony of Dodds, the mate, there is no escape from the presumption that the plaintiffs were parties to the fraud. At p. 95 the defendant's counsel called attention to this and asked the Court to charge that if the sugar failed to get on board by reason of a conspiracy with Garcia or any other person, the plaintiffs could not recover.

The Court refused to alter the charge, and defendants excepted.

The result was to direct the jury that if they found there was a conspiracy they must find the plaintiffs were active parties in it.

Such was not the case, as a conspiracy between Garcia, the shipper, and the mate, would not complicate the plaintiffs necessarily.

It is true the Court did charge (p. 96) that if for any reason the 163 hogsheads were not on board, the plaintiffs could not recover; but the effect of the prior charge remained, and the jury might well believe to find for the

defendant was necessarily to find the plaintiffs principal actors in the fraud.

X.

Fifteenth Assignment.

The Court erred in instructing the jury that if they found for the plaintiff their verdict *must be* for $17,530.11, the value of 163 hhds. of sugar.

It is the exclusive province of the jury to pass upon questions of fact, and although the judge may advise them, and, as now settled in this Court, express an opinion on the evidence, he cannot go further, and he must submit every controverted question of fact to the determination of the jury.

Vicksburg R. R. Co. *vs.* Putnam, 118 U. S., 545.
U. S. *vs.* Reading R. R. Co., 123 U. S., 113.
Rucker *vs.* Wheeler, 127 U. S., 93.
Lovejoy *vs.* U. S., 128 U. S., 173.

The assessment of damages rests *with the jury only*, subject to the instructions and direction of the Court *as to the measure of damages* in any particular case.

Graham's Practice, 290, 323.
III. Wait's Practice, p. 175.
Thornton on Juries and Instructions, p. 116.

The question of damages is ordinarily one of law and fact. The rules to be applied to the facts and the essential elements of the action are questions of law to be determined by the Court. The facts necessary to authorize a recovery under the law as given, and *the amount* to

which a plaintiff may be entitled under the law, and the facts must be found by the jury.

Field's Law of Damages, p. 25.
2 Whittaker's Practice, 392–3.
Sedgwick on Damages, 1, p. 22 ; 2, pp. 650–653.

Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions, the case is properly left to the jury.

Railroad Co. *vs.* Stout, 17 Wall., 657.

But the jury are to weigh and decide on the sufficiency of the evidence, and the Court cannot give an instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.

Tracy *vs.* Swartwout, 10 Pet., 26.
Greenleaf *vs.* Birth, 9 Pet., 299.
Jewell *vs.* Jewell, 1 How., 219.
Harsewell *vs.* Coursen, 81 N. Y. R., 630.

Here was no disputed question *of law* as to damages; but it had been admitted that the value of the sugar in dispute and interest was $17,530.11, or at the rate of $107.54 per hogshead. The question was purely one of fact as to what part of the sugar in dispute, if any, was on board.

The defendant denied that *any one* of the 163 hogsheads for which payment was claimed was on board; the issues in the case involved not only the question whether *all* were on board, but whether each one was on board. The Court practically instructed the jury if *any one* was found to be on board *all* were. The correct instruction would have been that if the jury found that the whole 163 hogsheads claimed by defendant not to have been on board, were actually on the vessel when she sailed, their verdict should be for the plaintiff in the sum of $17,530, and if they found that any number less than 531 and greater than 223 hogsheads were on board, then they should find

for the plaintiff in the invoice value thereof, with interest. But it was wholly unjustifiable to instruct the jury that they *must* find for the plaintiff for the value of the whole 163 hogsheads or nothing. The jury might well have been convinced upon the evidence that the vessel was not fully loaded when she sailed, and yet have differed as to the exact amount of the shortage. It was entirely competent to find that some particular cargo on the launches never reached the *Georgia*—it was competent to disbelieve some one witness, it was competent for them in general, to determine, on the evidence, *what amount* of sugar was on board the *vessel*, and not only competent, but their peculiar province, and the charge of the Court had the vice of assuming the function of the jury and instructing them to find for the plaintiff the entire claim, or for defendant, which was clearly erroneous.

In Harsewell *vs.* Coursen, 81 N. Y. R., 630, it is held, that on the trial of an action, the plaintiff is entitled to go to the jury on any theory consistent with the pleadings which his evidence will justify. Before he can be limited to any certain theory on appeal, it must appear in the case as settled that he has thus limited himself on the trial, and a new trial was ordered, because the judge practically charged that the plaintiff had stated the case on a certain theory—where the pleadings and proofs would justify a recovery on other grounds.

In Tracy *vs.* Swartwout, 10 Pet., 26, an action against a collector, it was held that an instruction that only nominal damages are to be given is erroneous if there was evidence which the jury had a right to weigh tending to prove actual damages, and the Court here discusses the entire rule.

In Wood *v.* Tomlinson, 53 California, 720, an action to recover the value of 198 hogs sold and delivered to the defendant, the answer alleged, and testimony was given to show, that only 128 were delivered. The Court charged: "If, from all the evidence you find, that the defendant agreed to receive the hogs at plaintiff's ranch, then you

will find for plaintiff for the amount the hogs would bring at 4 cents per pound, less the $300 advanced by defendant."

Held erroneous, as assuming the fact that plaintiff delivered all the hogs to defendant, and the judgment was reversed and a new trial awarded.

It would seem that a statement of this point must, apart from any other question, be conclusive on the case, and that a statement of the proposition carries with it conclusive proof of error.

If the judge at a trial can instruct, as in this case, then the Court could have instructed the jury that if they believed *all* the sugar claimed was not on board, then were to find that *none* of it was on board.

Moreover, the defendant at the trial did not content itself with an exception to the charge (fol. 209), but called attention to the point that it was the province of the jury to find the amount of sugar on the vessel, and the Court, with this plain suggestion and intimation, refused to leave the question of the precise amount on board to the jury, where it belonged.

The Court really left it to the jury to say if any amount of sugar in excess of 368 hogsheads were on board, but directed them to find that if *any* was there, ALL was.

To that extent the Court directed a verdict.

Finally.

The plaintiffs in error earnestly insist that if the Trial Court erred in any one of the matters excepted to and assigned as error a new trial should be ordered. An inspection of the evidence contained in the bill of exceptions will, it is thought, convince the Court that the slightest fact or circumstance tending to show that the entire cargo of 531 hogsheads was laden upon the *Georgia*, and which was improperly admitted in evidence, may have turned the scale in the minds of the jury and controlled their verdict.

The direct evidence on behalf of the plaintiffs that the

entire cargo was placed on the vessel, when analyzed, comes down to the statements of Antonio Jorge, the Captain of the *Esperanza*, admittedly derived from the receipts which the mate testified were fraudulent, and of Gabriel Garcia, whose extraordinary vision penetrated through wharves and warehouses to the *Georgia*, three miles down the bay, and saw every detail of the loading and unloading of the cargo.

Opposed to these was the positive testimony given in open Court, of three of the crew and of the mate, that the vessel was not full, but lacked upwards of 150 hogsheads to complete her cargo, that cargo was brought out several times to her on the steam launch, a portion only delivered to the *Georgia*, and the remainder taken to the *James McCarthy;* also the undisputed evidence that only 368 hogsheads were in or taken out of the vessel after she was stranded on the Cruz del Padre reef.

To strengthen their case, however, the plaintiff produced a mass of evidence, taken on commission at their place of business in Cuba, going to show that they purchased 531 hogsheads of sugar of certain grades and weights, and ordered it shipped on the *Georgia*, and that it was weighed and shipped in the usual way. They took the depositions of all the persons who handled the sugar in its transit from the storage warehouses to the ship. The witnesses were almost all employees of the plaintiffs, they were well primed and furnished with *memoranda* made up for use on their examination (see Brown's testimony, p. 65), the original books and papers from which they stated the memoranda were copied, *in no instance being produced before the Commissioner*. If any link in the chain is broken, the effect of the whole is destroyed. For instance, Obeso testifies to weighing 48 hogsheads and delivering them to the *Trillo* to be carried to the *Esperanza* for delivery to the *Georgia*. Suarez, that he received them on the *Trillo*, took them to the Boca and delivered them to the *Esperanza*. Jorge, that he received the same from the *Trillo* and delivered them to the *Georgia* on June 14th. As against this, three of the crew

and the mate swear that only 20 or 22 hogsheads were received aboard on that day.

But Obeso produces a memorandum of weights and numbers showing that on such a day he weighed so many hogsheads of such and such weights, and this gives a greater value to his testimony than has the unaided recollection of the crew. Take away this memorandum and Obeso's testimony amounts to little, and Jorge's testimony being admittedly dependent upon the mate's receipts, the chain of evidence as to the 48 hogsheads is greatly weakened, and the jury might have believed the evidence of the defendants' witnesses as to that last load, and this might well have led to a different verdict than that rendered.

Again, the testimony of Gabriel Garcia that he weighed and set apart for shipment 402 hogsheads for delivery to the *Georgia* was dependent upon his memorandum read in evidence.. Without this written corroboration upon this point, the jury might, and probably would, have given little weight to his statements as to counting the hogsheads after they were on the launch, and to his remarkable capacity to weigh sugar and see cars loaded, and at the same time keep in view all the movements of a steam launch proceeding through a crowded harbor to an anchorage three miles distant, and to be able to swear positively that she went to but one vessel, and unloaded all of her cargo there. So, too, the testimony of Ferreria and Bañasco, covering though they did but part of plaintiff's case, served to strengthen the apparent regularity of the shipment and convince the jury that the cargo must have been on board.

As to the letters from Garcia to Guardiola & Tejedor, they perhaps more than any other testimony may have influenced the verdict. Taken as *bona fide* daily reports from the agent to the shipper, they create an appearance of regularity, of an ordinary course of shipment, of truthfulness, which a jury may have regarded as outweighing any disputed oral testimony, and compelling their determination that the cargo must have been put on board.

At all events, the Court cannot say that, in the absence of this evidence, the same verdict would have been arrived at.

The evidence conclusively shows that a fraud was committed in the voyage of the *Georgia*. The plaintiffs claim that the master barratrously wrecked her, without their concurrence. The defendants, without knowing who actually concocted the fraud, or precisely what the scheme was, contended that one result of it was that one hundred and sixty-three hogsheads, for the value of which they are sought to be held liable, were never put upon the vessel. It appeared in evidence conclusively that the plaintiffs, after receiving information of the loss of the vessel, endeavored to effect an increase in the insurance of the cargo. Having engaged in one fraud, they may well have undertaken another, and the defendant is entitled to the benefit of every irregularity committed upon a trial which resulted in holding the company liable to such claimants under such circumstances, and upon evidence which should manifestly have led to a different result.

Had not the jury been prevented by the instructions of the Court, they might have found that, while the whole 163 hhds. were not missing from the vessel, a smaller number were, and that the vessel was not fully laden, and might have rendered a verdict for a correspondingly smaller amount. The ruling which prevented this result is in itself sufficient error to warrant a reversal of the judgment.

For all of these reasons, we respectfully submit that the judgment should be reversed and a new trial ordered.

JOHN L. CADWALADER,
Of Counsel for Plaintiff in Error.

United States Supreme Court.

OCTOBER TERM, 1888 – No. 159.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,

vs.

JAMIE S. GUARDIOLA AND TOMAS TEFEDOR,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE F. EDMUNDS,
WILLIAM W. GOODRICH,
Counsel for Plaintiff in Error,
No. 59 Wall Street, New York.

U. S. Supreme Court.

THE INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff in Error,

against

JAMIE S. GUARDIOLA *et al.*,
Defendants in Error.

Brief for Defendants in Error.

APPEAL FORM A JUDGMENT OF THE U. S. CIRCUIT COURT FOR $18,869 ENTERED ON THE VERDICT OF A JURY.

Statement.

The action is brought to recover the value of 163 hogsheads of sugar out of 532 hogsheads belonging to the defendants in error laden on the brig Georgia at Sagua la Grande and bound for New York. The vessel was barratrously wrecked by the master and crew on a desolate reef called the Cruz del Padre, on the north side of Cuba.

George C. Carson & Co., of Philadelphia, held an open policy in The Insurance Company of North America, and had been in the habit of entering on such policy all cargoes of sugar shipped to them by the defendants in error Guardiola & Tejedor, of Cardenas, Cuba.

On June 14th the defendants in error wrote Carson & Co. advising them of the shipment of 531 hogsheads and one tierce of sugar by the brig Georgia, enclosing the invoices and directing them

to insure the cargo and advances at the invoice price and 10 per cent. additional (fol. 61). This was the stipulation of the policy (fol. 8).

This letter was received by Carson & Co. on June 21st (fol. 223). They reported, on the same day, to the Insurance Co., which, on June 22d, entered the risk on their policy, the sugar at $41,888 and the advances at $995 (fols. 120, 223).

On May 21st, 1880, the defendants in error had chartered the brig Georgia to carry for them a full cargo of sugar from Sagua la Grande to a port north of Hatteras at the freight of $3.25 per hogshead (see charter party, folio 217).

Thereafter and prior to June 14th the firm loaded on said vessel at Sagua 531 hogsheads and one tierce of sugar, which will hereafter be spoken of as 532 hogsheads. The vessel sailed on the 15th of June (fol. 56).

The sugar was loaded as follows:

At the wharf in Cardenas ..... 216 hogsheads, (fols. 50, 76).

After which the brig hauled into the stream because there was not sufficient water at the wharf (fol. 55).

Shipped by lighters:

The Esperanza.....	268	
The Trillo.....	48	
		316
(fol. 50).		532

The Insurance Company denied the shipment of more than 368 hogsheads, and a commission was issued to Cuba and numerous witnesses were examined who traced the sugar from the estates where it was grown to the deck of the brig. These witnesses embraced the persons who sold and packed the sugar, the brokers who made the sales, the persons who received and saw it in the warehouses and delivered it therefrom, who weighed it, who counted the number of hogsheads delivered, who paid and received the export duties on it, who

loaded some aboard the brig at the wharf and some on lighters, and the lightermen who lightered the remainder of it from the wharf to the vessel as it lay in the stream and the stevedore who stowed the cargo in the brig.

The result is tabulated as follows:

No. of Hhds.	Estate.	Seller.	Date.	Weight	Price.	Where Stored at Time of Purchase.
324	Antonina.	Arché.	Apr. 28,	591,590	8 Rials.	Mori Agueira & Co.
44	do	"	"	87,790	" "	"
28	San Francisces.	Nunez.	May 28.	50,390	7⅛	Lavie.
53	Santa Clara.	"	" 24.		"	"
1	do	"	" "	93,940	" "	"
34	Union.	Mesa.	" "	60,440	7¼ "	Rodercquez.
48	Santa Elena.	Suré.	" "	88,210	7 "	By Rail.
					$7^{5}/_{16}$ "	
				972,360		

The invoice weight was as follows:

Hhds. 1 to 324 marked S..... 520,599 net
" 1 to 207 and 1 tierce marked $\frac{S}{C}$ ..... 335,077 net

855,676

(See fol. 47.)

This at 4½ cts. makes the invoice value.. $39,806.90
Freight $3.25 per hhd..... 1,727.37

38,079.53
Add 10 per cent..... 3,807.95

$41,887.48

(See fol. 47.)

M. Garcia, the shipbroker, proved the number of casks delivered as follows:

At the wharf .....hhds. 216
At anchor..... " 268
" ..... " 48
——532

(See fol. 67.)

He paid Custom House export duties as follows:

May 26th	200	hogsheads.
" 29th	100	"
June 14th	100	"
" 9th	100	"
" 14th, 31 hhds., 1 tierce	32	
	532	

(Folio 70.)

Valdes, Custom House officer, proved the payment of duties, and that he tallied and counted the hogsheads which he saw delivered to the brig at the wharf as follows:

May 25th	200
" 29th	100
" "	16
	316
Less returned	100
	216

(See fol. 89.)

Ferreira, the Custom House officer, proved the payment of duties, and that he tallied and counted the hogsheads delivered to the lighters Esperanza and Trillo as follows:

June 3d, Esperanza	50	hhds.
" 4th, "	86	"
" 5th, "	53	"
	1	tierce.
June 9th, "	78	"
" 14th, Trillo	48	"
	316	

(See folio 72.)

Antonio Jorge, master of the lighter Esperanza, testified that he received on his lighter and delivered the following number of hogsheads:

June 3d,	from	wharf		50
" 4th,	"	"		86
" 5th,	"	"	53 hhds. and 1 tierce	54
" 9th,	"	"		78
" 12th,	from	the Trillo		48
				316

D. Suarez, master of the Trillo, testified that on June 11th he received on board 48 hogsheads from the wharf, and delivered them to the Esperanza on the 12th.

The brig's receipts for the sugar shipped by the lighters were put in evidence and prove the number of hogsheads shipped as follows:

By the Esperanza, June 3d	50
" " " " 4th	86
" " " " 5th	53
" " " " "	1
" Trillo, June 14th	48
	316

(See folio 62.)

The brig's bills of lading were also put in evidence as follows:

S 1 to 324
S
C 1 to 207
1 tierce.

532

(See folio 61.)

Dodds, the mate, called as a witness for the plaintiff in error, admitted that 216 hogsheads were loaded at the wharf, and that he signed the ship's receipts for cargoes delivered by the lighters, and which had been produced by the defendants in error, but testified that some of the receipts were false, and that he knew that they were to be used for fraudulent purposes and that he was in the conspiracy, though he does not name the conspirators, nor attempt to connect the defendants in error therewith (fol. 166).

The following is a tabulation from his evidence, showing the alleged difference between the receipts and the number of hogsheads received by the brig, although his testimony is confused and unreliable:

	Receipts.	No. Received.
June 3	50	50
" 4	86	36
" 5	54	24
" 9	78	24
" 14	48	20
	316	163

The defendants in error also proved by the respective weighers that the sugars were weighed as follows:

Number of Hhds.	By Whom.	What Estate.
368	G. Garcia } Borasco }	Antonina
28	Sanvada	San Francisces
53	"	Santa Clara
1	"	"
34	G. Garcia	Union
48	Sanvada } Obeso }	Santa Clara
532		

The schedules showing the respective weights of the hogsheads will be found on pages 97, 98, 99, 102 and 103.

Captain Drinkwater, who became master of the Georgia subsequent to this disaster, testified that she could then carry 525 hogsheads; that by the repairs made after the wreck her carrying capacity was reduced 10 hogsheads; that with 525 hogsheads her draft was 13 feet 6 inches (fol. 94).

Frank W. Carlsen, one of the crew of the Georgia, called by the Insurance Company, testified that the 13 foot mark was under water when the vessel sailed (fol. 150).

The mate and three sailors from the brig were called by the plaintiff in error to prove that the vessel was not fully loaded, that the mate gave false receipts for more cargo than he received, that the vessel was leaking and unseaworthy and was purposely wrecked by the master.

The mate and some of the crew confessed their guilt before the United States Consul at Cardenas (fol. 133).

The vessel sailed on June 15th, and was barratrously wrecked by her master and crew on or before June 17th, on a desolate reef called Cruz del Padre.

Collins, captain of the Deitz, a passing vessel, saw the Georgia sailing directly for the reef, and saw her cargo gaff and purchase already rigged to discharge cargo, and two or three lighters putting out to meet her (fol. 96).

Subsequently auger holes were found to have been bored in her bottom (fol. 102).

On June 18th, Gartiez, a wrecker, saw the vessel on the reef and went to her to render assistance but was driven off by the master with curses and threats (fol. 99, 103).

Shortly after the wreck one Queipo, a lighterman, who with his lighters had evidently been hiding in the vicinity of the wreck and waiting for her coming, took from the wreck and secreted 57 hogsheads which were recovered by the underwriters and are included in the 223 brought to New York. Queipo was arrested and taken before the U. S. Consul and confessed his guilt, and that he was in league with the master, and the master afterwards absconded (fol. 131).

The agent of the underwriters saved from the wreck a number of hogsheads of the cargo; others were thrown overboard and others were found empty, the contents having been dissolved by the sea water.

The result was as follows :

Saved and brought to New York	223	
Thrown overboard	4	
Empty	141	368 Hogsheads
Leaving unaccounted for	163	"
	1	Tierce
	532	

(See folio 121.)

A large part of the evidence for the Insurance Company related to the claim of the Insurance Company that the defendants in error telegraphed Carson to increase the insurance after they had heard of the wreck of the Georgia.

So far as the original insurance is concerned it is immaterial whether this claim is well founded or not, except so far as it affects the credibility of the defendants in error and upon this question the jury have passed.

A brief statement of the evidence upon this subject will, however, be found useful.

The U. S. Vice-Consul, at Cardenas, Joseph H. Washington, heard of a wreck which was known to be the Georgia, on the 18th of June, but says that he took no action then, but went to the wreck on the 22d of June (fol. 128).

The U. S. Consul, George L. Washington, learned of the wreck by advices from his Vice-Consul on the 19th or 20th of June (folio 133).

The defendants in error among other witnesses, had examined on commission one Culmell, who was their corresponding clerk. No part of his deposition appears in the record, except his answer to the final cross interrogatory to which he said that he knew of nothing which would tend to the advantage of the underwriters.

The action was first tried before Judge Shipman and a jury in October, 1884. On that trial Culmell was examined as a witness on behalf of the Insur-

ance Company. His evidence was read at the second trial from the minutes of the first trial.

He stated that on Sunday morning, June 20, before breakfast, he received a telegram from Rabel, of Cardenas, which he sent to Mr. Tejedor at his home. This telegram was from Cardenas and being translated reads: "The Georgia totally lost on the Cruz del Padre" (folio 57).

A copy of the original telegram in Spanish was annexed to the commission and was produced at the trial and has upon it the memorandum, "Rec. June 21, 9 A. M." (folio 66).

Rabel, on June 22d, wrote the defendants in error:

"I am favored by your esteemed favors of the 18th and 19th, and telegram in answer to mine of day before yesterday, referring to the Georgia which arrived in my hands too late to give you minute details by mail as I desired" (folio 220).

It is evident, although Rabel's telegram is not dated, that it was not received by Culmell or Tejedor till the 21st.

On the morning of June 20 (folios 57, 58 and 60), the defendants in error telegraphed Carson:

"Market firm, 8 rials, increase insurance, invoiced Georgia 20 per cent."

On June 21st the defendants in error wrote Carson, saying: "We telegraphed you last night."

Culmell further testified that after sending Rabel's telegram to Tejedor he received a memorandum (without any date upon it) directing him to telegraph Carson to increase the insurance, to telegraph Rabel thanking him for the information and also to Guardiola, at Havana, informing him of the loss of the Georgia (folio 171), and that he telegraphed Carson (folio 172).

Carson testified that he received the telegram not on the 20th, but on the 21st (folio 105). Such is also the memorandum on the telegram as to the date of the receipt by Carson: "Received at the S. E. Corner Third and Chestnut Streets, 6, 21, 80" (folio 178).

Such is also the statement of the letter of Carson to the defendants in error (folio 107).

Guardiola testified that seeing the rise of sugar in the market he telegraphed Carson to increase the insurance, and that the day after this he received the telegram from his house at Sagua informing him of the loss of the Georgia (folio 81).

Neither of the defendants in error, who were residents of Cuba, was present at the trial.

The jury by their verdict disregarded the evidence of Culmell and found the statements of the defendants in error sustained as they were by the written evidence to be true.

The real and vital questions in the case are, whether 532 hogsheads of sugar were shipped upon the brig and whether the defendants in error were guilty of a conspiracy to defraud the Insurance Company.

It was agreed by counsel for the Insurance Company that the value of the 163 hogsheads with interest was $17,530.11 (fol. 184), and for this sum the jury rendered their verdict.

POINTS.

First.—This Court will not be astute to impute error in a case when it appears from the record either that substantial justice has been done or that the admission or rejection of evidence has not affected the result, or that a new trial would not be likely to eventuate differently.

The real questions in this case, whether the 532 hogsheads were laden abroad the brig, and whether the vessel was barratrously wrecked by the master or crew without the knowledge of the firm, were clearly submitted to the jury.

Alleged Errors.

Second.—Exceptions Nos. 1 and 2 at fols. 49 and 50.

The plaintiff in error excepted to the introduction of a written statement of the weights of some of the sugar, prepared by the witness Obeso, on the ground that it was not the best and was not competent evidence, and after its introduction moved to strike it out.

Obeso was twice examined under a commission issued to Cuba, and stated on the first occasion that he saw 48 hogsheads of the sugar weighed and counted them and kept the numbers, marks and figures. On the second examination he stated that "he could not give the original of this note of weight of the said 48 hogsheads because such note of weights was engrossed in his book of weights and other business of the store which he superintended and belonging to the plaintiff." He then stated that the total weight of said 48 hogsheads amounted to 82,210 lbs.

The defendants in error offered to read the statement. The plaintiff in error objected to the evidence on the ground that it was not competent evidence and not the best evidence. *It did not object on the specific ground that the original book should have been produced before the commissioner, nor was any notice given before or at the trial to produce the original books, or to produce them before the commissioner and annex them to the deposition.*

United States *v.* Masters, 4 Wall, 680.
Burton *v.* Driggs, 20 Wall, 125.
Wood *v.* Weimar, 109 U. S., 695.
Noonan *v.* Caledonia Mining Co., 121 U. S., 400.

The witness had the right to testify after having refreshed his memory by examining these or any other memoranda. He testified that he saw the hogsheads weighed, read the weight from the steel-

yards as each hogshead was weighed and that the weight was put down in the book in his own handwriting, and that he made the copy produced from the book (fol. 49).

The memorandum was competent evidence at the trial, the original books being in a foreign country.

Tucker *v.* Woolsey, 6 Lansing, 482.

Besides, the witness had already sworn to the gross weight, and the introduction of the memorandum did not affect his testimony upon that subject and was not afterwards in any way attacked by the plaintiff in error.

It was subsequently agreed between counsel that the value of the sugar on the 163 missing hogsheads with interest was $17,530.11 (see fol. 184), and this admission waived any objection to the evidence which was a part of the proof offered to show the weight and value of the 163 hogsheads.

The evidence was in fact merely incidental to the main issue, viz., the physical delivery of the 532 hogsheads of sugar on board the vessel.

The rule of evidence which requires the production of a writing which is the subject of the action, has no relevancy to the proof in question.

Where it is necessary to prove particular facts, and an examination cannot be conveniently made in Court, the results may be proved by a person who made the examination, the books being out of the State and beyond the jurisdiction of the Court.

Burton *v.* Driggs, 20 Wallace, 125.
Bailey *v.* Johnson, 9 Cowen, 115.
Forest *v.* Forest, 6 Duer, 137.

The rule as to the production of private writings which are in a foreign country, is not so strict as the rule to be applied in a case where the writing is at the place of trial.

Tucker *v.* Woolsey (*supra*).

The admission of the evidence had no effect upon the general result as the question litigated related

not to the weight of the several casks of sugar or the aggregate weight of all, but whether 532 hogsheads were laden.

Third.—Exception No. 3, at fol. 54, to the introduction of similar memorandum by Garcia, another weigher, as to 402 hogsheads.

Fourth.—Exception No. 4, at fol. 74½.

Ferreira, a Custom House officer, also examined on commission, testified that he saw 268 hogsheads delivered to the Esperanza and 48 to the Trillo.

On cross-examination he said that he kept a memorandum which at the time of his testifying was in the Custom House (fol. 74) which was then an official record—"that he did not speak from memory but from a memorandum which at the time of testifying he held in his hand."

The evidence is within the well known rule that a witness may examine a memorandum to refresh his memory. He testified positively to the number. The memorandum itself was not offered in evidence.

Besides the entries were in public documents in a foreign country which might have been proved by a copy.

1 Greenleaf Ev., Sec. 480 & 482.

Fifth.—Exceptions Nos. 4, 5 & 6, at folio 80.

Banasco, also examined on commission, testified that he saw 368 hogsheads of sugar weighed at the store of Moré Ajuriã & Co. and that an entry was made in the books of that firm and produced a copy of such entry; that the copy was correct—that the weight was 679.380 pounds.

(The defendants in error objected to the reading of the memorandum as before.)

These books were not within the control of the defendants in error.

Sixth.—Exception No. 7, at folios 84, 85.

Guardiola, one of the defendants in error, was also examined under the commission to Cuba.

The counsel for the plaintiff in error having omitted to read the answer to the fifteenth cross-interrogatory, the defendants in error offered to read it.

The question was, "Has it not been stated in your hearing that certain of the cargo or proceeds have been received by some person or persons?"

The plaintiff in error objected that the question called for hearsay evidence.

The answer was then read.

The answer of the Insurance Company denied the allegation of the complaint that 532 hogsheads were laden aboard the brig. It admitted that 368 hogsheads had been laden. It alleged that after the stranding 57 hogsheads were removed by the defendants in error or with their assent and concurrence.

Under this issue the plaintiff in error cross-examined Guardiola to show that the defendants in error knew of the theft of the 57 hogsheads.

The question did not limit the time of the witness' knowledge, but was general, and required an answer of all knowledge up to the time of the examination.

The witness gave all his knowledge, all that had been stated "in his hearing" upon the subject.

The evidence was material to contradict the allegation of the answer.

The plaintiff in error having drawn from this witness his knowledge the defendants in error were entitled to read the evidence. A party will not be permitted to question his adversary on such a subject and then refuse to have his evidence read.

Even if it was error to admit the answer at the stage of the case when it was offered, the error was cured when the plaintiff in error read the evidence of its witness Joseph H. Washington, at folio 131, and of George L. Washington, folios 133 and 134; of F. W. Carlsen, folio 142; of Oswald Thorson, folio 153; Skiffington Dodds, folio 162, and of Thomas F. Wilson, folio 168.

Seventh.—Exception No. 8, at folio 88.

Jose De Los Santos, the pilot of the brig, testified that the vessel drew 13 feet 4 inches of water when she left the port of Sagua.

On cross-examination he stated that he did not measure the draft but asked the Captain and was told by him that her draft was 13½ feet.

The plaintiff in error moved to strike out the evidence of her draft as hearsay.

The Court charged the jury that "As it appeared that the only information the pilot had was derived from statements made to him by the captain and mate, you are at liberty, and I think I will say

that upon this proof you must disregard that evidence (folio 199).

Pennsylvania Co. *v.* Roy, 102, U. S. Sup. Ct. Rep., 458, 459.

Eighth.—Exception No. 9, at folio 102.

The defendants in error examined Julio J. G. Gartiez under commission, and proved by him that he had been put in charge of the wreck by the American Consul, and on his cross-examination, which was read by the defendants in error, he stated that on June 26th he saw "a large auger hole in the hull of the Georgia, on the edge of which there were several others of smaller dimensions" (folio 102).

The plaintiff in error objected to the evidence on the grounds:

1st. That it was inadmissible as evidence of the condition of the vessel when she sailed from port; and,

2d. If it was introduced as evidence of her condition when stripped and lying on the reef, it had no bearing on the case.

The witness, *without objection*, had already testified on his direct examination that he had seen these auger holes (fol. 100), so that the repetition of the testimony even under objection was not error.

But the evidence was material upon the allegation of the complaint that the vessel was wrecked by the barratry of the master and crew (fol. 6).

The testimony at folio 101 shows that these auger holes could only be discovered when the tide was low, the vessel lying partially submerged on the reef.

It would manifestly have been impossible for any one to have bored these holes while the vessel was lying on the reef submerged, and the evidence was material to show and was a proper way of showing that the vessel was bored before the water got into her.

Ninth.—Exception No. 10, at folio 118.

The plaintiff in error moved to dismiss the complaint at the close of the testimony of the defendants in error on the grounds:

1st. That the vessel was unseaworthy at the inception of the risk.

2d. That there was a deviation from her proper course.

3d. That the defendants in error had failed to prove that the vessel was lost by the barratry of the master or mariners.

It is sufficient to say generally that there was abundant proof to render each of these three propositions untenable.

But an examination of each of the grounds of the motion may be useful.

As to the 1st proposition. The English authorities make unseaworthiness a ground of defence and place upon the underwriters the burden of proving unseaworthiness.

Lowndes Marine Ins., Sec. 173.

The American authorities are not unanimous upon the subject.

In the case of Lunt *v.* The Boston Marine Insurance Company (19 Blatch., C. C., 156), Judge Wallace uses the following language:

"There are two cases in the Federal Courts which are entitled to great consideration, because of the learning and eminence of the Judges before whom they were tried, where the question was directly considered and instructions to the jury were delivered; but unfortunately they are in direct antagonism. Mr. Justice Story in *Tidmarsh* v. *Wash. Ins. Co.* (4 Mason, 440), instructed the jury that the burden of proof to establish seaworthiness was upon the assured, while Mr. Justice Curtis, sitting in the same Circuit, in the later case of *Bullard* v. *Roger Williams Ins. Co.* (1 Curtis, C. C. R., 148), instructed the jury that the burden of proof was upon the insurer. The English cases favor the conclusion that seaworthiness is assumed as a fact, in the absence of countervailing facts, and, therefore, that the assured is entitled to the benefit of the presumption (*Watson* v. *Clark*, *1 Dow., 336; Parker* v. *Potts*, *3 Dow., 23;*) and in the recent case of *Pickup* v. *Thames Ins. Co.*, decided by the Court of Appeals in 1878 (L. R., 3 Q. B. Div., 594), all the Judges agree that the presumption of law is *prima facie* in favor of seaworthiness and the burden of proof to the contrary is on the insurer. That was an action on a policy, and it was proved on the trial that the vessel put back from inability to proceed eleven days after she started on her voyage. The Judge directed the jury that this circumstance was sufficient to shift the onus of proof from the underwriter and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail. This was held to be error, all the Judges agreeing that the presumption is *prima facie* in favor of seaworthiness, and that the burden of proof to show the contrary is upon the insurer. The same conclusion is sanctioned by the weight of authority in our own courts (Taylor *v.* Lowell, 3 Mass., 347; Paddock *v.* Franklin Ins. Co., 11 Pick., 227; Myers *v.* Girard Ins. Co., 26 Penn., 192; Snethen *v.* Memphis Ins. Co., 3 La. Ann., 474)."

In the Courts of New York State there are two cases which impose the burden of proving seaworthiness upon the assured, but these and other cases hold clearly that only the slightest evidence of seaworthiness is required to shift the burden of proof to the insurer.

Moses *v.* The Sun Ins. Co., 1 Duer, 159.
Borland *v.* The Mercantile Ins. Co., 46 N. Y. Superior, 433.

2. As to the 2d and 3d grounds the auger holes in the vessel's bottom, the hidden lighters, the removal of the sugar, the flight of the captain, the confession of the mate before the Consul and the testimony of the mate and seamen called by the plaintiff in error furnish abundant evidence to establish that both the deviation and the wreck were barratrous.

Tenth.—Exception No. 11, at folio 126.

Mr. Platt, the President of the Insurance Company, called as a witness on its behalf was asked on cross-examination by the defendants in error "Did you say to Carson that you would insure no more cargoes for Guardiola & Tejedor?"

Under objection as to its competency he replied that he did.

The testimony was material to show the prejudice and bias of the witness.

Eleventh.—Exception No. 12, at folio 127.

The counsel for the plaintiff in error asked the same witness:

"Did that conversation to which the counsel called your attention in regard to saying that you were aware of the unseaworthiness of the vessel refer to the cargo which you did pay for?"

The defendants in error objected that the question called for a conclusion.

The correct method of examination was to state the conversation itself and not the operation of the witness' mind.

Twelfth.—Exception No. 13, at folio 137.

The plaintiff in error called a witness who was asked, Did you see in that receipt book (of Marcelino Garcia) any receipt for cargo upon the same date as some of these shipments were made, on the identical dates made by James McCarthy?

The defendants in error objected to the evidence and it was excluded.

The book itself would have been inadmissible and incompetent to contradict Garcia as he had not been examined as to any such receipt.

Moreover it was an improper method to prove the contents of a book not produced.

Thirteenth.—Exception No. 14, at folio 146.

The defendants in error on cross-examination asked Carlsen one of the crew of the vessel:

"Don't you think that the Captain meant to wreck that vessel when he left Sagua?"

The plaintiff in error objected to the evidence as

immaterial, as calling for the opinion of the witness and as guesswork.

The witness answered, "That is more than I can tell you."

This witness had testified that there were not 532 hogsheads laden on board the vessel; that the brig was badly stowed; that it was leaking; that she deviated from her course; that the captain ran away from Cardenas; that there were auger holes in her; that Quiepo came aboard.

The question was legitimate cross-examination, but if it was not the answer elicited no evidence.

Fourteenth.—Exception No. 15, at folio 181.

The defendants in error in rebuttal offered in evidence and read under objection five letters written to them by Garcia Bros.

These letters were part of the *res gestae*.

The letters were the correspondence between the firm of C. Garcia & Bros., with the defendants in error, both of whom, Gabriel Garcia and Marcelino Garcia, had been examined as witnesses. The plaintiff in error had attacked the credibility of these witnesses and the letters which were the reports of the loading and despatch of the vessel, were offered to corroborate their previous testimony.

It will also be seen that the plaintiff in error claimed that Garcia Bros. were in a conspiracy with the defendants in error in regard to the loading of the sugar.

See request to charge at folio 207.

The law on this subject is admirably stated by Mr. Greenleaf:

"There are other declarations, which are admitted as original evidence, being distinguished from hear-

say by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances, so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes, and its kindred facts, materially affecting its character, and essential to be known, in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestae*, may always be shown to jury, along with the principal fact; and their admissibility is determined by the Judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

1 Green-Ev., § 108.
Beaver *v.* Taylor, 1 Wall, 642.

Fifteenth.—Exception No. 16, at folio 183.

Monjo who had become assignee of the claim in suit was asked,

"As soon as you took an assignment of this claim, did you report to me and deponent's counsel or one of his firm about the assignment to you?"

The plaintiff in error objected to the evidence as immaterial.

The witness answered, "We did; we notified you and you notified them."

It had already appeared in the evidence of Mr. Platt, President of the Insurance Company, that Messrs. Carson & Co., had not been repaid by the defendants in error the whole amount of the drafts

drawn upon them against the bills of lading of the sugar and that the Company agreed to and did loan them the balance about $5,000 in order to make up their advances (fol. 124).

The evidence was offered to show that such loan was made without the knowledge or authority of the defendants in error or their assignee, the witness Monjo, and that Carson & Co. had no authority to receive any money from the insurers on account of the defendants in error.

Sixteenth.—Exception No. 17, at folio 184.

At the close of all the evidence the plaintiff in error asked the Court to direct a verdict for the plaintiff in error upon the same grounds as were stated in the motion at the close of the case of the defendants in error.

This motion was denied properly for the reasons which appear at the Ninth Point.

Seventeenth.—Exception No. 18, at fol. 207.

The counsel for the plaintiff in error "called the attention of the Court to the fact that it had charged the jury in substance, that there was no escape from the presumption that if there was a fraud the plaintiffs were a party to the fraud and requested the Court to charge the jury on that point, that if the sugar did not get on board by reason of any conspiracy with Garcia or from any other source still they could not recover."

The Court refused to alter the charge in that respect and the plaintiff in error excepted.

The Court had not charged as stated. The only sentence that might have been thought to bear such construction will be found at fol. 201.

"Of course, if taking his testimony (Dodds, the mate) in connection with the other testimony in the case, you say that he has told the truth here, then there is no escape from the presumption that these plaintiffs were parties to the fraud and of course they cannot recover."

Eighteenth.—Exception No. 19, at folio 208.

The plaintiff in error excepted "to so much of the charge of the Court as instructed the jury that 'if you find in favor of the plaintiffs, then your verdict will be for $17,530.11,' on the ground that it was the province of the jury to find a verdict for the value of any amount of sugar which they might determine to have been on board the vessel."

The complaint alleged and the evidence showed that 532 hogshead of sugar were laden aboard the brig; the insurers admitted that 368 hogsheads had been laden. The only number in dispute was the 163 hogsheads, and the whole trial proceeded on that theory.

The defendants in error asserted in their complaint that the following was the true method of determining the amount due under the policy:

Insured value of sugar		$41,888.00
Advances of freight		995.00
		$42,883.00
Recd. from sale of 223 hhds., (fol. 118).	$11,666.93	
Recd. from plff. in error (fol. 121).	13,847.23	25,514.16
Balance		$17,367.84

with interest from Sept. 8, 1880.

The parties stipulated that the value of these 163 hogsheads including interest from Sept. 8, 1880, was $17,530.11 (for 184).

(See North Penn. R. R. *v.* Commercial Bank, 123 U. S., 733).

The Court just previously to this charge had stated two propositions:

1st. Was this a seaworthy vessel?

"2d. Were 532 hogsheads of sugar placed on the vessel? If you say that there were not and that there was a deficiency of 163 hogsheads in the amount, then your verdict will be for the defendant. If upon these two propositions you find in favor of the plaintiff, you then come to the question of barratry, and if you say upon this proof that she was wrecked by reason of the villainous conduct of the master or mate, then your verdict will be for the plaintiffs, *provided, as I say, you find the other two propositions in their favor.* If you find in favor of the plaintiffs then your verdict will be for $17.530.11."

The exception is therefore untenable because the part of the charge excepted to is only to be construed with its context.

Nineteenth.—The decree of the Circuit Court should be affirmed with costs and interest.

GEORGE F. EDMUNDS,
WILLIAM W. GOODRICH,
Counsel for Defts. in Error.

Supreme Court of the United States.

October Term 1888.

INSURANCE COMPANY OF NORTH AMERICA, Plaintiff in Error,
vs.
GUARDIOLA & TEJEDOR, Defendants in Error.
No. 159.

Reply of Defendants in Error to the Principal Points in Brief of Plaintiff in Error.

I.

The points of plaintiff in error are, in substance, only a few, though fifteen errors are assigned.

A.

The admission of memoranda made by witnesses from large business books in Cuba, in which the original entries were made in the usual course of business at the time, in connection with other evidence of facts within their own knowledge and stated in the entries.

B.

The admission of the evidence of Banasco (R., p. 37 *et seq.*, F. 78 and 79), who was in charge of the stores, of warehouse men, together with a memorandum copy, made apparently by him from the original entry in his warehouse books, the original entry not being in his

handwriting, but that of his deputy, made under his direction,—he knowing and having seen the weighing and shipping operations therein referred to, but being unable to state the minute particulars without reference to the books and his memorandum so made.

C.

The allowing the plaintiff below to read cross-interrogatory 15 of the plaintiff in error in the deposition of Guardiola, and his answer in connection with the rest of the cross-interrogatories and his answer thereto. (R., p. 40.)

D.

In allowing to go to the jury the evidence of Gartiez relating to the condition of the "Georgia," in regard to the finding auger-holes in her hull while she was ashore. (R., p. 48.)

E.

In rejecting defendant's offer to show that in the books of one of the persons, through whom the plaintiffs shipped sugar, there were receipts for cargo sent by the brig "McCarthy," on the same day as some of the shipments by the "Georgia."

F.

In admitting the letters annexed to the deposition of Tejedor, of the factors and shippers to the plaintiffs in error, in the course of the lading of the vessel, and in connection with the other evidence adduced in regard to her actual lading.

It is conceived that the other assignments of error deserve no special notice.

As to point *a*, it is sufficient to observe that, as it regards all these memoranda so read in connection with the testimony of the witness, the decision of this court in McCool *v.* Lekamp, 2 Wheat., 111, is precisely in point, including the circumstance that in one of the instances the memorandum copy was taken from books apparently within the control of the plaintiffs below. The following cases fully support the principle on which Chief Justice Marshall announced the opinion of the court in the case of McCool, viz.:

9 Wall., 677, Insurance Co. *v.* Weide.
14 Wall., 375, Insurance Co. *v.* Weide.
20 Wall., 125, Burton *v.* Driggs.

In all such cases it is the *fact of delivery* to the other party, or on board ship as in this case, and not the strength of the particular proof adduced, that is the question in issue, and so the matter in the administration of justice is a question of practical common sense in regard to the credibility of the witness or the paper in connection with his testimony, that is important, and not the question of when the entry in regard to it was made.

It may be admitted that the defendants below might have technically required that the books containing the original entry of these business movements should be produced before the Commissioner, and copies therefrom made by him; but, so far as appears from the record, no such requirement was made. All that was asked was (in some of the instances) that the witness should produce the *books and annex them to the deposition*, which was, of course, absolutely impracticable. No demand was made by the defendants below, either to produce the books before the Commissioner for inspection there, as distinguished from their being annexed to the deposition, and no notice was given or

application made to the court for the production of the books at the trial.

In respect of point *b*, it is enough to say, in addition to what has been said as to point *a*, that the plaintiff in error is mistaken in supposing (apparently) that the memorandum mentioned, as well as that of Obeso, was not a memorandum made by himself, as it plainly appears in the record to have been his own, made from an inspection of the books. The whole transaction of fact and physical movement was, as testified, under his own observation, and whether the particular entries made at the time in the course of it were put down by his own hand or that of his clerk is quite unimportant.

In respect of point *c*, it is submitted that—

1. The evidence was admissible as primary evidence on the part of the plaintiffs in connection with the rest of the examination, and in view of the defense that the disputed shipment had not been made, and that the plaintiffs were parties to the fraud, and so as giving a full explanation of all that was known and heard at the time in regard to what had become of the cargo.

2. If he could not have been allowed to state fully and primarily all that he stated in answer to the cross-interrogatory, it is just as if a question had been submitted to a witness in court, implying that the plaintiff knew, or had heard something which might lead the jury to suppose that he was privy either to the non-lading or stealing of the cargo, and so the witness, the plaintiff, having answered the question responsively and fully, it was not within the right of the defendant to object to the jury having the benefit of it. The question was pertinent, and the defendant had a right to put it, and the answer

being responsive, the defendant cannot be allowed to take the consideration of the answer from the jury.

Greenleaf's Evidence (12th ed.), v. 1, p. 375, s. 88, n. 5, s. 324, n.
10 Cushing (Mass.), pp. 569–70.
Linfield *v.* Old Colony R. R. Co.
37 Maine, 216, Lord *v.* Moore.

In respect of point *d* (R., p. 48), the point made arises out of the defendant's own cross-examination, and the evidence was perfectly pertinent to the issue as to whether or not the vessel had been wrecked barratrously or otherwise within the meaning of policy, and simply described the condition in which he found the vessel immediately after she was stranded, which of course would include the fact of his finding auger holes in the hull. It was a description of the *corpus delicti.* The objection was—

1. That it was inadmissible to show the condition of the vessel when she sailed. As to this it would tend to show that the vessel was unseaworthy when she sailed, and therefore was evidence in favor of the defendant.

As to the 2d objection, that if it related to her condition when on the reef, the evidence would have been simply immaterial and unimportant, and so would furnish no ground of setting aside the verdict; but if material, as it really was, it was direct and competent evidence to show that the vessel had been wrecked by the barratry of the master or of some persons on board.

In respect of point *e* (Mr. Cadwalader's brief, p. 40—12th assignment), (R., p. 65), it is submitted that the question was clearly not admissable. It was whether the witness, an insurance agent, having no connection with any of the transactions of the shipment, or with any of the shippers or their books, could be permitted

to testify that he had seen in the receipt book of Garcia, a general warehouse man, a receipt for cargo delivered to the "McCarthy" on the same day with the dates of shipments shown to have been made to the "Georgia,"—the point being to leave the jury to infer, if the question was answered affirmatively, that such a statement would tend to show that some of the sugar in question had been put upon another vessel. The mere statement of this proposition is its sufficient answer, in view of the business and circumstances.

2. If it was desired to show that some of the sugar in question had been delivered to another vessel by any entries in the book of a warehouse man it must be by some witness who, or whose clerks, had some relation to the book in question, and could state in regard to the truth of the entry and the relation it had to the issue. It might as well be contended that, in a suit by a merchant on an account for a sale of goods to A, a stranger might be introduced to testify that he had seen in the books of that merchant, or, rather, in the books of the carrier or delivery man, that similar goods appeared to have been delivered to another party on the same day. We think it unnecessary to pursue such a discussion.

In respect of point *f* (R., p. 84, *et seq.*,) (Mr. Cadwalader's brief, p. 33), the letters of the warehouse men, confessedly sent to the plaintiffs below at the time and in the regular course of the transactions of shipment, were clearly admissible. The objection was that they were "irrelevant," and not any other. The delivery of cargo on board the "Georgia" was denied, and evidence was given, by cross-examination and otherwise, which, it was claimed by the defendants

below, tended to impeach the good faith and regular business order of the transactions. Thus every step in the course of the transaction by the plaintiffs, their agents, warehouse men, customs officials, and others connected with such operations, was material to be known, and so, as a part of the *res gestae*, and entering into the daily operations of the putting on board of the cargo, the communications from the factors, warehouse men, etc., regarding their then daily and present conduct, were essentially interesting and pertinent. This may be well illustrated by supposing a cross-examination on such points, which nobody would deny would be admissible, which should lead to answers from the factors and warehouse men that, although the usual course of business was and must be that constant communications of the lading should be made to the principal parties concerned, no such communications had been made, and that the plaintiffs below had never been informed that any cargo whatever had gone on board, in the face of the fact that an insurance for a particular cargo, so represented to have gone on board, as in these disputed letters stated, had actually been made. In the absence of such evidence as this a jury might well have been justified in believing that by the plaintiffs, or by some of their agents, or factors, a fraud had been intended against the insurance company (which was the contention of the defendants), and that the represented cargo had never reached the ship. If it would have been competent for the defendant to negative any such course of business, it would be equally clear on the issue raised that the plaintiffs might prove that every step was taken in the regular and daily order of lading and report.

GEO. F. EDMUNDS,
WM. W. GOODRICH,
Counsel for Defendants in Error.